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No. **2626**.....

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MINERS' & MERCHANTS' BANK, a corpora-
tion,

Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Defendant in Error.

Transcript of Record

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

Alaska Printing Co., **Seattle's Brief Printers**, Alaska Bldg. Main 7398

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JUL 27 1915

F. D. Monckton,

No.....

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*In the District Court of the United States for the
Western District of Washington,
Northern Division.*

No.....

MINERS' & MERCHANTS' BANK, a corpora-
tion,

Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF COUNSEL.

JOHN W. ROBERTS, Esq., Attorney for Plain-
tiff in Error,

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H. J. RAMSEY, Esq., Attorney for Defendant in Error,

661 Colman Building, Seattle, Washington.

COMPLAINT.

Comes now the plaintiff, Miners & Merchants Bank, and for cause of action against the defendant, United States Fidelity & Guaranty Company, complains and alleges:

I.

That at all times herein mentioned the plaintiff, Miners & Merchants Bank, was and is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Washington, and doing a general banking business at Ketchikan, Alaska. And has paid its annual license tax last past due.

II.

That at all times herein mentioned the defendant, United States Fidelity & Guaranty Company, was and is a corporation duly organized, incorpo-

rated and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact a surety business in the State of Washington and within the District of Alaska, and was and is transacting such surety business within the State of Washington and Territory of Alaska, and was and is engaged in writing surety bonds in said territory and state.

III.

That on or about the first day of May, 1906, the defendant, United States Fidelity & Guaranty Company, through its duly authorized agents and representatives, solicited the plaintiff to write fidelity bonds for and upon its employees in its banking house at Ketchikan, Alaska, and particularly to write a bond upon Mack A. Mitchell, cashier of plaintiff, and did apply to the plaintiff to be allowed to fully indemnify and keep indemnified the plaintiff bank against any and all harm, loss or damage on account of any wrongful acts on the part of its cashier, said Mack A. Mitchell.

IV.

That the said defendant held out to the plaintiff, its officers and agents, as an inducement to be allowed, for a consideration and an annual premium to be paid by the plaintiff to the defendant, to write said fidelity bond, that it would at all times, until such time as said bond should be cancelled or terminated, keep the plaintiff bank wholly and fully insured and indemnified against any and all loss or damage on account of the wrongful acts of said

defendant, Mack A. Mitchell, and represented to the plaintiff and did agree to and with the plaintiff that it would from time to time and from year to year cause said bond to be renewed, continued and extended without any additional cost, expense, trouble or annoyance to the plaintiff or its officers, except the payment of the annual premium, and would keep said bond in force and renewed, continued and extended, and would keep the plaintiff fully insured and indemnified against loss or damage in connection with or on account of the wrongful acts or conduct of said Mack A. Mitchell, its cashier.

V.

That the said defendant, United States Fidelity & Guaranty Company, as a further inducement to this plaintiff to place the insurance of its cashier with defendant, and as a part consideration for the premium to be paid by the plaintiff to the defendant, stated and represented to this plaintiff and agreed to and with the plaintiff that the defendant was in a position to give and would give to the plaintiff at all times while said insurance or any renewal or extension thereof were in force, the very best of service and the very highest grade of insurance to be had in that line of surety and fidelity insurance, and that if there should be any changes, alterations, amendments or improvements in the form of the bonds to be written and executed to banks or bankers indemnifying or insuring such bank or bankers against loss by or through their employees, that the said defendant would at all times furnish

to plaintiff such improved or changed form of bond, and see that such bonds were furnished to the plaintiff and that plaintiff should at all times have the benefit and advantage of the most liberal and advantageous bond written by any surety company, and whether it was so expressed in the bond or not, the plaintiff should and would at all times have the benefit and advantage of the most liberal provisions contained in any fidelity bond written, or which could or would be written by any like company, and did promise and guarantee that plaintiff should have at all times the fullest and best insurance written or to be had or secured from any surety company.

VI.

That the plaintiff, relying upon said representation, statements and agreements and at the earnest solicitation and request of defendant, United States Fidelity & Guaranty Company, did on or about the 1st day of May, 1906, pay to the defendant, United States Fidelity & Guaranty Company, the sum of \$100, as the annual premium upon a bond to be written for the period of one year from the 1st day of April, 1906, to the 1st day of April, 1907, insuring the plaintiff against any unlawful acts on the part of the said Mack A. Mitchell, who was at that time cashier of the plaintiff bank, and who continued to be cashier of said bank and to act in that capacity until on or about the 31st day of December, 1913; and in pursuance of said premium duly paid to defendant corporation, the defendant corporation

did make, execute and deliver to plaintiff its certain fidelity bond, a copy of which is hereto attached, marked exhibit "A" and made a part of this complaint.

VII.

That by the terms and conditions of said bond and the contract had between plaintiff and defendant, it was expressly contracted, understood and agreed that the United States Fidelity & Guaranty Company, as insurer, for an annual premium of \$100, guaranteed to pay to the Miners & Merchants Bank of Ketchikan, Alaska, the employer, any and all pecuniary loss which the said bank should sustain of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction, misapplication or misappropriation or any criminal acts by said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said bond and continuing in the sum of \$25,000, until said insurance should be terminated, and did expressly agree to indemnify the plaintiff against any and all pecuniary loss that might be sustained by the bank by reason of the fraud or dishonesty of the said Mack A. Mitchell in connection with the duties of his office or position amounting to embezzlement

or larceny, and which should have been committed during the continuance of said insurance or any renewal thereof.

VIII.

That prior to the expiration of said bond the same was renewed and continued in force, and extended by the defendant, United States Fidelity & Guaranty Company to be effective on the 1st day of April, 1910, said renewal and extension having been made wholly by the United States Fidelity & Guaranty Company, its representatives and agents, and by reason of the original agreement and understanding under which said insurance was written and through and under which said defendant corporation, by its duly authorized representatives, agreed at all times to keep this plaintiff fully indemnified with the best insurance of that character to be obtained with nothing to be done on behalf of plaintiff except to pay the annual premium, which annual premium was paid by plaintiff to the defendant, and received and accepted by defendant, and a written agreement of extension delivered by the defendant corporation to plaintiff, a copy of which extension agreement is hereby attached, marked Exhibit "B" and made a part of this complaint.

IX.

That the defendant corporation continued to renew said surety and fidelity agreement from year to year and until the 1st day of April, 1914, and that plaintiff did, for each year, pay the defendant

corporation in advance its annual premium, and the defendant corporation did during each year receive and accept said annual premium, which annual premium continued to be the sum of \$100, until the first day of April, 1913, when the premium was reduced to the sum of \$62.50, and the said defendant surety company did at all times continue to renew its agreement of insurance and indemnity to this plaintiff as against the said Mack A. Mitchell, and any and all loss on account of wrongful acts of said Mack A. Mitchell, and said insurance was at all times kept in full force and effect; that the said renewals and extensions until the 1st day of April, 1913, were made in the same way and in the same manner as the one hereto attached, marked Exhibit "B," and were of like tenor and effect.

X.

That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit "C" and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursuance of the original agreement and contract indemnifying and insuring said bank as hereinabove stated and as a part of the same transaction. That said bond was and is in the sum of \$25,000, and was made for a period of one year from the 1st day of April, 1913, and is still in full force and effect. That the plaintiff

paid to the defendant and the defendant received and accepted from the plaintiff as consideration for said execution, renewal and extension of said bond the sum of \$62.50, and then and thereby said insurance agreement and contract was extended and continued in full force and effect until the 1st day of April, 1914.

XI.

That as a consequence of said contract of insurance and in consideration of the payment of the said annual premiums by plaintiff to defendant, the plaintiff was, and has been and is insured and indemnified by the defendant and indemnified and insured by defendant against any and all loss or damage which the said plaintiff should, on account of said Mack A. Mitchell, sustain of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction, misapplication or misappropriation or any criminal acts by said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said contract of insurance and continuing in the full sum of \$25,000, and until the termination of said insurance, which is still in force and has, since April 1st, 1906, been insured

against all wrongful acts of said Mack A. Mitchell amounting to larceny or embezzlement.

XII.

That on or about the 9th day of December, 1913, the plaintiff, Miners & Merchants Bank, discovered certain facts in relation to said Mack A. Mitchell, and conduct on the part of the said Mack A. Mitchell, its cashier, which led the plaintiff to believe that the said Mack A. Mitchell had been guilty of acts or conduct which would give rise to a claim under said contract of insurance, and did thereupon and immediately prepare and serve upon the local agent and representative of the United States Fidelity & Guaranty Company, at Seattle, Washington, and did mail to the United States Fidelity & Guaranty Company, at its head office at Baltimore, Maryland, a certain notice in writing, a copy of which is hereto attached marked Exhibit "D" and made a part hereof. That the said plaintiff did prepare in writing the said notice, claim and demand, a copy of which is hereto attached marked Exhibit "C," and did, in strict compliance with the terms and conditions of said bond, address said written notice to the United States Fidelity & Guaranty Company at its head office at Baltimore, Maryland, and did serve upon the local agent and representative of the defendant corporation in the City of Seattle, Washington, a like copy of said notice, claim and demand, and did assert then and there and at that time as against said corporation a claim and demand on account of said

insurance in the sum of \$25,000, the full penalty of said contract of insurance.

XIII.

That it was stated and set forth in said notice that the plaintiff had dispatched an expert accountant to Ketchikan, Alaska, to examine the books and records of the bank and the accounts of Mack A. Mitchell, and that upon the return of said expert accountant, further notice would be given, and full information and particulars of all kinds furnished by plaintiff to defendant, in strict compliance with all the terms and conditions of said contract of insurance.

XIV.

That plaintiff did send immediately to Ketchikan, Alaska, an expert accountant and thereafter and upon his return the plaintiff did serve upon and deliver to the United States Fidelity & Guaranty Company, in strict compliance with the terms and conditions of said contract of insurance a further notice, claim and demand, a copy of which is hereto attached, marked Exhibit "E" and made a part of this complaint, which said notice was duly served upon said corporation on the 17th day of December, 1913, and receipt thereof duly acknowledged by the said corporation on the said 17th day of December, 1913.

XV.

That said Mack A. Mitchell was and is guilty of having wrongfully, dishonestly and fraudulently taken or abstracted from the plaintiff bank a total

sum of money in excess of \$25,000, the full penalty of said contract of insurance and fidelity bond. That said Mack A. Mitchell was and has been guilty of having violated the terms, conditions and provisions of said indemnity insurance and fidelity bonds as herein before fully set forth, and that said wrongful acts and conduct on the part of said Mack A. Mitchell began on or about the 15th day of May, 1913, and continued to and including the 14th day of August, 1913, during all of which period said contract of insurance was in full force and effect, and that during said period the said Mack A. Mitchell, in express violation of the terms, conditions and provisions of said contract of insurance, did wrongfully and unlawfully take, abstract and remove from said bank a sum of money in excess of \$25,000, for all of which the defendant corporation was and is liable to this plaintiff and to the full extent of \$25,000.

XVI.

That subsequent to the service of the written notices and demands herein referred to and hereto attached, the plaintiff furnished and supplied to the defendant and to its representatives all facts, circumstances and conditions of the misconduct on the part of said Mack A. Mitchell, and did furnish to the defendant corporation all reasonable particulars and proofs of the correctness of said claim and did freely and willingly at all times give, deliver and furnish to said corporation all the particulars of said larceny and embezzlement on the part of

said Mack A. Mitchell, and of all the facts and particulars showing the said Mack A. Mitchell to have been guilty of fraud and dishonesty in connection with the duties of his office and position, which amounted to embezzlement and larceny and which was committed during the continuance of said contract of insurance, and that the plaintiff did submit and furnish to the said defendant all the books and records of plaintiff bank, together with all papers in connection with the said pecuniary loss sustained by plaintiff, or was occasioned by the wrongful act or acts of fraud, dishonesty, embezzlement and wrongful abstraction or misapplication or misappropriation of funds and property of plaintiff, all of which was and is alleged and affirmed by the plaintiff that the said Mack A. Mitchell was and is guilty. That the plaintiff not only brought all its books, records and papers to Seattle, Washington, and submitted the same to the defendant corporation and its representatives, but at its own expense sent an expert accountant to Ketchikan, Alaska, in company with a representative of defendant corporation, for the purpose of further investigating and examining all the books, papers and records of plaintiff bank, and of placing the defendant corporation in the possession of full and complete data, facts and particulars in connection with the transactions of said Mack A. Mitchell, as cashier of plaintiff bank during the period of said term of insurance.

XVII.

That during all the period between the 15th day of May, 1911, and the 15th day of August, 1913, all the best and most responsible surety companies doing business in the State of Washington and the Territory of Alaska did write and were writing surety and fidelity bonds known as the Bankers' Form of Bond, and containing all the guarantees and liberal provisions of plaintiff's Exhibit "C," and during all of said period the best and most responsible surety companies were writing bonds more liberal in their provisions than Exhibit "C" and carrying and containing better and more substantial guarantys as against loss or damage on account of employees. But for the agreement, promises and representations expressly made to plaintiff by the defendant, through its duly authorized agents and representatives, that it was giving plaintiff the best form of bond and the best insurance to be had, this plaintiff could and would at all times have obtained from other good and responsible surety companies insurance fully indemnifying and guaranteeing it against loss against any wrongful act or acts of its employees. But the plaintiff at all times relied solely and wholly upon the promises and representations of the defendant and its duly authorized agents, and at all times depended solely upon the assurance of defendant and its representatives that plaintiff was fully insured against any loss, harm or damage on account of any of said wrongful

acts of the said Mack A. Mitchell and left the matter of the continuation and renewal of said insurance and of giving the plaintiff at all times the best insurance to be had entirely to the defendant and its representatives and agents.

XVIII.

That during all of the period hereinabove named the defendant charged the plaintiff for said contract of insurance on account of the said Mack A. Mitchell, the highest premium charged or collected by any other surety or fidelity company doing business within the State of Washington or the Territory of Alaska, and did during all of the eight consecutive years charge and collect from this plaintiff the full premium charged by any and all of the most substantial and responsible insurance companies doing business within the Territory or State named, and did at all times charge this plaintiff and collect and receive from this plaintiff during said entire period the premium charged for the best, most modern and up-to-date insurance of that character to be had from any surety company, which premium was at all times paid by plaintiff upon and under the agreement and understanding that it was receiving at the hands of defendant at all times the most modern and up-to-date policy and insurance of that kind or character to be procured.

XIX.

That notwithstanding the above and foregoing facts, circumstances and agreements, the defendant,

United States Fidelity & Guaranty Company, now seeks to repudiate and has repudiated its entire liability and obligation and has denied and denies that it ever agreed or promised to write a modern and up-to-date policy and denies that it was giving or attempting to give the highest class or best class of insurance of the character named which was being written by good and responsible surety companies in this field, and denies that it promised or agreed to give or write a modern and up-to-date policy or to furnish the best insurance of the kind in this or any other instance or that it promised any of its patrons or customers to give or write for them up-to-date policies containing the broad and liberal provisions and guarantys of the form of policy known as the Bankers' Form, and denies and repudiates any and all obligation on account of any of the wrongful acts of said Mack A. Mitchell as herein fully set forth.

XX.

That this plaintiff has made due demand upon said Mack A. Mitchell for the return of the money so wrongfully abstracted by him as aforesaid, and that said Mack A. Mitchell has wholly neglected, failed and refused to repay the same or any part thereof, and that there is now justly due and owing from the said Mack A. Mitchell on account of the matters and things hereinabove set forth a sum of money largely in excess of \$25,000.

XXI.

That the plaintiff bank has at all times since it entered into the contract of insurance with the defendant fully complied with all the terms, conditions and provisions of said contract of insurance, and has fully kept and performed all the terms, conditions and provisions of said contract of insurance by it to be kept and performed. That it has fully and promptly paid all premiums, and since the discovery of said wrongful acts and conduct on the part of said Mack A. Mitchell, has fully complied with all the terms and conditions of said contract of insurance on its part to be kept and performed.

XXII.

That notwithstanding said Mack A. Mitchell has wholly violated and breached the terms and conditions and provisions of said bond and has been guilty of all the wrongful acts enumerated in said contract of insurance, and notwithstanding the said Mack A. Mitchell has been guilty of wrongful acts amounting to larceny and embezzlement and notwithstanding the said Mack A. Mitchell has been and is guilty of causing pecuniary loss to plaintiff bank of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by the act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction,

misappropriation or criminal acts of said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said contract of insurance and continuing in the full sum of \$25,000, and notwithstanding the said Mack A. Mitchell has been and is guilty of wholly breaching and violating said contract of insurance, and has been and now is guilty of said wrongful and unlawful acts against which the defendant corporation expressly insured and indemnified this plaintiff, and notwithstanding the said Mack A. Mitchell has between the 15th day of May, 1911, and the 15th day of August, 1913, wrongfully abstracted and taken from the plaintiff bank a sum of money largely in excess of \$25,000.00, to-wit, the sum of \$40,337.83, all of which was embezzled, stolen, taken, abstracted and removed from said bank by said Mack A. Mitchell, during the term of said insurance; and notwithstanding the fact that the plaintiff bank has paid to the defendant corporation, United States Fidelity & Guaranty Company, the annual premiums charged by said corporation for said insurance for a period of eight consecutive years, having paid the said corporation eight consecutive annual premiums upon its contract of insurance upon and against the said Mack A. Mitchell, the said defendant corporation has wrongfully repudiated and now repudiates all liability on account of the said contract of insurance and has refused and refuses to pay to plaintiff the penalty of said bond or any part thereof, and wholly

repudiates its said contract and denies all liability and obligation to plaintiff, and refuses to repay to plaintiff its said loss and damage or any part thereof to the loss and damage of plaintiff in the full and just sum of \$25,000.

WHEREFORE, the plaintiff, Miners' & Merchants' Bank, prays for judgment against the defendant, United States Fidelity & Guaranty Company in the sum of twenty-five thousand dollars (\$25,000), together with interest thereon at the rate of six per cent (6%) per annum from the 6th day of December, 1913, until paid, together with all proper costs of this action.

JOHN W. ROBERTS,

Attorney for Plaintiff.

STATE OF WASHINGTON, }
COUNTY OF KING, } ss.

L. H. Woolfolk, being first duly sworn, on oath deposes and says, that he is the Secretary of the Miners' & Merchants' Bank, plaintiff in the above and foregoing entitled cause of action and that he makes this verification as such Secretary; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

L. H. WOOLFOLK.

Subscribed and sworn to before me this 4th day of April, 1914.

JOHN W. ROBERTS,

Notary Public in and for the State of
Washington, residing at Seattle.

[Cover]

Exhibit "A."

THE
UNITED STATES FIDELITY AND
GUARANTY COMPANY.

FIDELITY BOND

No.....

In Behalf of
MACK A. MITCHELL

to

MINERS' & MERCHANTS' BANK,
Ketchikan, Ala.

Date, April 1st, 1906.

Expires, April 1st, 1907.

CALHOUN, DENNY & EWING,
DISTRICT AGENTS
Seattle, Wash.

Form O. S. 1 M—9-7-03.

CAPITAL PAID IN CASH, \$1,700,000.

Amount, \$25,000.00. Annual Premium, \$100.00

Bond No. 450. No. 5764.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY.

Home Office,
Baltimore, Md.

WHEREAS, MINERS' & MERCHANTS' BANK, KETCHIKAN, ALASKA, hereinafter called "The Employer," is employing or intends to employ MACK A. MITCHELL in the capacity of CASHIER, hereinafter called "The Employee," and has filed with THE UNITED STATES FIDELITY AND GUARANTY COMPANY, hereinafter called "The Company," an application specifying the amount of security required from said Employee, and has applied to the Company for the grant of this bond; and

WHEREAS, the Company in consideration of the sum of one hundred and 00/100 dollars, now paid as a premium from April 1st, 1906, to April 1st, 1907, at 12 o'clock noon, has agreed upon the terms, provisions and conditions herein contained to issue this bond to the Employer; and

WHEREAS, the Employer has heretofore delivered to the Company certain representations and promises relative to the duties and accounts of the Employee, and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer, hereafter required by or lodged with the Company, are hereby expressly warranted to be true.

NOW, THEREFORE, THIS BOND, WITNESSETH, That for the consideration of the premises, the Company shall, during the term above mentioned, or any subsequent renewal of such term and subject to the conditions and provisions herein contained, at the expiration of three months next, after proof, satisfactory to the Company, as hereinafter mentioned, make good and reimburse to the said Employer, such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employee from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account of said Employee under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS.

PROVIDED, That on the discovery of any act capable of giving rise to a claim hereunder, the Employer shall, at the earliest practical moment, give notice thereof to the Company, and any claim made under this Bond shall be in writing addressed to the Company at its head office in the City of Baltimore; and shall within three months after

the discovery thereof, at the Employer's expense, furnish to the Company reasonable particulars and proofs of the correctness of said claim, and such particulars, if required, shall be verified by affidavit.

PROVIDED FURTHER, That the Company shall not be liable, by virtue of this Bond, for any act or thing done or left undone by the Employee in obedience to, or in pursuance of an instruction or authorization received by him from the Employer or any superior officer, or for any mere error of judgment or bona fide mistake, or any injudicious exercise of discretion on the part of the Employee, in and about all or any matters wherein he shall have been vested with discretion either by instruction or by the rules and regulations of the Employer.

PROVIDED FURTHER, That the Company shall not be liable under this Bond for the amount of any balance that may be found due the Employer from the Employee, and which may have accrued prior to the date hereof, it being the true intent and meaning of this Bond that the Company shall be responsible as aforesaid for moneys, securities, or property diverted from the Employer within the period specified in this Bond.

AND PROVIDED, ALSO, That this Bond is granted upon the express understanding or agreement that as against every corporation or person now being or hereafter becoming security or surety and upon every security held by the Employer for the Employee in his employment as aforesaid, the Company shall have and possess the right of ratable

contribution and all other rights and remedies, both legal and equitable, of co-sureties.

AND ALSO, That, should the Employe become guilty of an offence covered by this Bond, the Employer will immediately, on being requested by the surety to do so, lay information before a proper officer covering the facts and verify the same as required by law and furnish the Company every aid and assistance, not pecuniary, capable of being rendered by the Employer, his or its agents and servants, which will aid in bringing the Employe promptly to justice, and such action when required of the Employer shall be a condition precedent to recover under this Bond.

PROVIDED, That the Company shall have the right, upon giving thirty days' notice in writing to the Employer, to cancel this Bond at the expiration of said thirty days; and if the bond shall be so cancelled, the Company shall refund the proportion of the premium for the unexpired term of risk.

PROVIDED, That the Employe may perform other duties than those properly belonging to the position mentioned in this Bond without notice of such change being given to the Company.

PROVIDED, That the premium due the Company for becoming surety for the Employe named in this Bond shall be paid within thirty days after the delivery hereof, and if not so paid, this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

AND PROVIDED, LASTLY, That this Bond is also subject to the following conditions:

THAT, any misstatement or suppression of fact in any claim made hereunder renders this Bond void from the beginning.

THIS BOND will become void as to any claim for which the Company would otherwise be liable, if the employer shall fail to notify the Company of the occurrence of the act or commission out of which said claim shall arise immediately after it shall come to the knowledge of the Employer; and the knowledge of a President, Vice-President, Director, Secretary, Treasurer, Manager, Cashier or other like executive officer shall be deemed under this contract the knowledge of the Employer. And upon the making of any claim hereunder, this Bond shall wholly cease and determine as regards any act or omission of the Employee, committed subsequent to the making of such claim, and it shall be surrendered to the Company on the payment of such claim.

THAT, after the expiration of the Company's liability hereunder, and no claim having been presented the then unexpired portion, if any, of the term for which this bond was granted, shall apply to any new Employee whose risk, to the same amount, the said Company may at that time assume or the Company shall at the election of the Employer return to the Employer the unearned premium on return of this Bond for cancellation.

IT IS FURTHER MADE AN EXPRESS CONDITION of this Bond that no suit or action of any kind against the Company for the recovery of any claim upon, under or by virtue of this Bond, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced, and the process served on the Company within the term of twelve months next after the date of filing notice of a claim therefor as hereinbefore provided; in case any suit or action shall be commenced against the Company after the expiration of said period of twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

THAT no one of the above conditions, or of the provisions contained in this Bond, shall be deemed to have been waived by or on behalf of the Company, unless the waiver be clearly expressed in writing over the signature of its President and Secretary, and its seal thereto affixed.

THAT the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employee, and upon the issuance of any Bond subsequent hereto upon said Employee in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

AND THE EMPLOYE doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the Company that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expense, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this Bond, and without notice to him thereof) or for, or by reason or in consequence of, the Company having entered into the present Bond.

IN WITNESS WHEREOF, the said MACK A. MITCHELL (the Employee) has hereunto set his hand and seal, and the Company has caused this Bond to be sealed with its corporate seal, duly attested by the signatures of its Attorneys in Fact, this 1st day of May, one thousand nine hundred and six.

Signed, sealed and delivered by the Employee
at.....

.....L. S.

In the presence of

.....

.....

THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,

A. KENNARD,

DOUGLAS R. TATE,

Attorney-in-Fact.

Attorney-in-Fact.

Exhibit "B."

Continuation Certificate No. T-450.

Amount, \$25,000.00.

Premium, \$100.00.

Fidelity Department.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY.

Home Office,
Baltimore, Maryland.

IN CONSIDERATION OF THE SUM OF ONE HUNDRED (\$100.00) DOLLARS, THE UNITED STATES FIDELITY AND GUARANTY COMPANY hereby continues in force Bond T-450 in the sum of Twenty-five Thousand (\$25,000) Dollars, on behalf of MACK A. MITCHELL in favor of MINERS AND MERCHANTS BANK of Ketchikan, Alaska, for the period beginning the 1st day of April, 1910, and ending on the 1st day of April, 1912, subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of April, 1906.

WITNESS the signature of its Attorney-in-Fact under corporate seal this 1st day of April, 1910.

DOUGLAS R. TATE,
Attorney-in-Fact.

Exhibit "C."

UNITED STATES FIDELITY & GUARANTY
COMPANY.

Capital Paid in Cash, \$2,000.000.

Total Resources Over \$7,400,000.

Home Office :
Baltimore, Md.

No. 27999.

\$25,000.00.

The UNITED STATES FIDELITY AND GUARANTY COMPANY, as Insurer, for a premium of SIXTY-TWO and 50/100 (\$62.50) DOLLARS, hereby guarantees to pay to the MINERS & MERCHANTS BANK of KETCHIKAN, ALASKA, the Employer, such pecuniary loss as the Employer shall sustain (limited only by the provisos hereof) of money, bonds, debentures, scrips, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, currency, merchandise or other property, including that for which Employer is responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act by MACK A. MITCHELL, directly or through connivance in any position and at any location in the Employer's employ, and during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOU-

SAND (\$25,000.00) DOLLARS until the termination of this insurance.

PROVISOS:

1. In the event of the recovery of any loss, or portion thereof, from other than insurance, the Employer shall be entitled thereto until fully reimbursed, the excess, if any, to be paid to the Insurer.

2. The Employer shall deliver notice of any default hereof to the Insurer at its Home Office within ten (10) days after the discovery of such default. All claims shall be submitted, showing the items and dates of the losses, and delivered in writing to the Insurer at its Home Office within three (3) months after their discovery. The Insurer shall have two (2) months after claim has been presented in which to verify and pay the same, during which time no legal proceeding shall be brought against the Insurer as to that claim, nor at all as to that claim after the expiration of twelve (12) months from its date.

3. This insurance shall only terminate by:

(1) The Employer giving notice in writing to the Insurer specifying the date of termination.

(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases.)

(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

4. The discovery of any loss through the Employee.

IN TESTIMONY WHEREOF, THE UNITED STATES FIDELITY AND GUARANTY COMPANY has hereunto set its seal. Witness the hand of its Attorney-in-Fact, on this 1st day of April, 1913.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By C. H. CAMPBELL,

(Seal.)

Attorney-in-Fact.

Exhibit "D."

The United States Fidelity and Guaranty Company,
a corporation, Baltimore, Maryland, and Seattle, Washington.

On the first day of May, 1906, your company, as insurer, executed to the MINERS & MERCHANTS BANK, Ketchikan, Alaska, as employer, a fidelity bond upon Mack A. Mitchell in the capacity of Cashier of said Miners & Merchants Bank, conducting a general banking business at Ketchikan, Alaska.

Your bond was in the amount of Twenty-five Thousand Dollars (\$25,000), and has been renewed each succeeding year, including the the year 1913, the bond for the year 1913 bearing date April 1st, 1913, your bond having been continuously in force in the same amount since the said 1st day of May, 1906.

The Miners & Merchants Bank hereby notifies

you, under and by virtue of the terms of said various bonds and renewals thereof, that Mr. J. E. Chilberg, of Seattle, Washington, as President of the Miners & Merchants Bank of Ketchikan, Alaska, left Seattle on Sunday, November 30th, for Ketchikan, and has just returned to Seattle and that the Miners & Merchants Bank, through its officers, have just made discoveries which lead the bank and its officers to believe that the said Mack A. Mitchell, as Cashier of said bank, has been guilty of acts giving rise to a claim under your bond and that the Miners & Merchants Bank does hereby make claim upon and against your company for any and all and such loss as it may sustain by reason of, or on account of the acts and conduct of the said Mack A. Mitchell, as set forth in the bonds, to the full *extent* of the indemnity, to-wit, \$25,000.

Immediately upon suspecting any wrong-doing on the part of Mitchell the bank placed an expert accountant upon the books. This accountant is still at work and it is expected that he will return to Seattle on or about the 16th day of December, 1913, and when he does return a more full and definite report will be made to your company. It is impossible for the bank at this time to make to you a definite statement of claim as to details and amounts, but it takes this earliest opportunity to place before you such information as it has. It is the belief of the bank at this time that the abstractions from the bank by the cashier and the probable

loss to the bank on account thereof will exceed the sum of \$40,000.

The money in question has been taken from the bank through the medium of a concern known as the Revilla Fish Company, in which Mitchell appears to be a stockholder. As nearly as the bank has been able to ascertain the fish corporation is insolvent, and that said corporation has not now and never has had any assets of any particular value.

The exact date that Mitchell began to take moneys from the bank cannot at this time be given, but subject to correction we state that it was about, 1911. The entire transaction has been at all times concealed from the bank and its officers by Mitchell and in his reports made to the officers of the Bank at Seattle, from time to time, he concealed the transaction and harmonized the reports by understating the actual amount of deposits, his reports to the officers each time showing the deposits to be less in an amount actually equivalent to the shortage.

Upon the return of the expert accountant everything which he obtains will be at your command and the bank will furnish to your company everything which his report discloses. Mitchell has been removed from his position and is still at Ketchikan, Alaska.

Dated December 9th, 1913.

MINERS & MERCHANTS BANK,
By J. E. Chilberg.

Attest:—L. H. Woolfolk, Secretary.

Address: 1113 Alaska Bldg., Seattle, Wash.

Exhibit "E."

The United States Fidelity and Guaranty Company,
Baltimore, Maryland, and Seattle, Washington.

Gentlemen:—

December 9th, 1913, the undersigned, MINERS AND MERCHANTS BANK, doing business at Ketchikan, Alaska, served upon you a statement and a claim against your company on account of Mack A. Mitchell, Cashier of the undersigned bank.

The undersigned Miners and Merchants Bank does, in accordance with the statement made in the claim of December 9th, 1913, hereby supplement said claim and makes the following further statement:

The abstraction of money from the bank by Mack A. Mitchell began on the 15th day of May, 1911, and continued to and including the 14th day of August, 1913, and during that period the said Mitchell has wrongfully, dishonestly and fraudulently taken from the bank a total sum of Forty Thousand Three Hundred Thirty-seven and 83/100 (\$40,337.83) Dollars. That said sum of Forty Thousand Three Hundred Thirty-seven and 83/100 (\$40,337.83) Dollars was fraudulently taken from the bank by the said Mitchell as follows:

From May 15, 1911 to May 1st, 1912.....	\$20,722.06
From May 1st, 1912, to May 1st, 1913.....	18,927.50
From May 1st, 1913, to August 14, 1913.....	688.27
Total	<hr/> \$40,337.83

That said Mack A. Mitchell covered up the transactions from time to time by pretending to give this money to a corporation which was known first as Revilla Reduction Works, the name of which was afterwards changed to the Revilla Fish Products Company. Mitchell was a stockholder and officer in this corporation. The corporation had no assets of any kind except as Mitchell gave it money from the bank, and it now has property, which the undersigned bank has had appraised and as nearly as it can arrive at the value, believes it does not exceed Three Thousand Five Hundred (\$3,500) Dollars.

Mitchell took no notes from the corporation and no evidence of any kind of the indebtedness. He now claims it was "overdrafts" and the entire transaction was at all times concealed from the officers of the bank.

On June 30th, 1911, Mitchell prepared a report to the Clerk of the United States District Court at Juneau, Alaska, and another copy to the Honorable William L. Distin, Secretary of Alaska, both of which reports are required by law to be made, and he caused said reports to be filed at that time under oath, and said reports did not show any overdrafts, although Mitchell at that time had taken from the bank and given over to the fish company Thirteen Hundred Eighty-eight and 05/100 (\$1,388.05) Dollars of the bank's money. In order to balance his account in the report he deducted \$1,388.05 from the

deposits and made a false representation and caused a false affidavit to be filed as to the actual amount of the deposits in the bank. Mitchell at the same time made like statements and reports to the officers of the bank and practiced the same deceit upon the officers of the bank.

On December 30th, 1911, in conformity with the rules and regulations of his Board of Directors and superior officers, he caused to be prepared a statement of the condition of the Miners and Merchants Bank and which statement was by him submitted to the Board at Seattle and said statement, account and report was made and submitted and showed no overdraft and no evidence of the money taken from the bank by Mitchell, and which he now claims he turned over to the fish company, although at that time and on that date he had taken the sum of Four Thousand Three Hundred Seventy-four and 90/100 (\$4,374.90) Dollars, but in his report he made no account of such sum or any part thereof, but absolutely concealed it from the officers of the bank by reducing the amount of money actually on deposit in the bank.

On June 30th, 1912, Mitchell made another report to the Clerk of the United States District Court at Juneau and caused the same, duly verified, to be filed as required by law, and at that time he had wrongfully and fraudulently abstracted and taken funds of the bank to the amount of Twenty-three Thousand Six Hundred Nineteen and 60/100 (\$23,-

619.61) Dollars and wholly failed to make any report of such sum or to make any accounting whatever of any such sum in the sworn reports filed as required by law, but dishonestly and fraudulently concealed the same both from the officers with whom the reports are required to be filed and with the United States Government, and from the bank and its officers.

On December 31st, 1912, he made another report to his Board of Directors in Seattle and in addition to his written report was personally present before the Board at Seattle and he concealed the fact that he had in any manner taken money or any money from the bank; he disclosed nothing in the way of overdrafts and specifically and expressly stated and represented to the Board that there was no overdraft in the bank, although at that time he had taken from the bank the sum of Thirty-six Thousand Thirty-one and 19/100 (\$36,031.19) Dollars.

July 15th, 1913, Mitchell again prepared his annual report to the Secretary of the Territory of Alaska and to the Clerk of the United States District Court at Juneau and caused said report, duly verified and sworn to, to be filed in the manner provided by law and in such reports made no statement of any overdraft or overdrafts and no accounting of any kind of shortage, although he had at that time taken from the bank the sum of Forty Thousand Twenty-eight and 03/100 (\$40,028.03) Dol-

lars. That he likewise made his usual annual report and statement to the Board of Directors of the bank, and again absolutely deceived the directors and misrepresented the facts and concealed from them the fact that the said sum of Forty Thousand Twenty-eight and 03/100 (\$40,028.03) Dollars or any other sum, had been by him in any manner taken from the bank and again represented that there were no overdrafts of any kind and showed none and both in said sworn reports and in his reports to the directors he had fraudulently and dishonestly and falsely misrepresented the amount of deposits in said bank and had deducted from the deposits the sum of Forty Thousand Twenty-eight and 03/100 (\$40,028.03) Dollars, in order to cover up and conceal his wrongful taking of the funds.

Since May 1st, 1913, Mitchell took from the bank the following sums at the following times, and in amounts and items as follows, to-wit:

May 29th, 1913.....	\$394.40
July 7th, 1913.....	3.42
July 8th, 1913.....	73.25
July 18th, 1913.....	6.00
August 12th, 1913.....	203.80
August 14th, 1913.....	100.00
Total	<hr/> \$780.87

In the claim made and served upon you on the 9th day of December in this matter for the sum of Twenty-five Thousand (\$25,000) Dollars, as pro-

vided in your several bonds and the renewals thereof, it was stated that the bank had an expert accountant working upon the books of the bank, and the undersigned now advises you that that accountant was Mr. O. S. Larson, whose office is at 1113 Alaska Building, Seattle, Washington, you are at liberty to take this matter up with Mr. Larson, who will, on behalf of the bank, furnish you proofs of the correctness of said claim and give to you all the information obtained by him from the books of the bank and all of the items of the account, if you should desire such items, and all of the knowledge and information in his possession, and after having given to you all of such particulars the bank will, if required by you, have the correctness of the claim and account verified by affidavit. Since Mr. Larson has the records and all data assembled in his office he would prefer, if it is convenient to you, to have you come to his office, but if you shall indicate that you prefer to have Mr. Larson go to your office he will do so at any time you will name as being convenient to you and furnish to you any additional proof and information.

MINERS & MERCHANTS BANK,

By J. E. CHILBERG, President.

Attest:—L. H. Woolfolk, Secretary.

The undersigned, United States Fidelity & Guaranty Company, acknowledges receipt of copy

of the above and foregoing statement this 17th day of December, 1913.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

By JOHN C. McCOLLISTER,

Manager and Attorney-in-Fact.

Filed in Clerk's office April 4, 1914. W. K. Sickels, clerk. By F. W. Smith, deputy.

Filed in the U. S. District Court, Western District of Washington, May 14, 1914. Frank L. Crosby, clerk. By E. M. L., deputy.

ANSWER.

Comes now the United States Fidelity & Guaranty Company, a corporation, and answers the complaint of the plaintiff, as follows:

I.

In answer to Paragraph 1 of said complaint defendant admits the same.

II.

For answer to Paragraph 2 of the complaint defendant admits the same.

III.

For answer to Paragraph 3 of the said complaint this defendant denies the same and each and every allegation therein contained, except that it admits that it did on or about the first day of May, 1906, engage to indemnify and keep indemnified the said plaintiff against alleged loss or damage on ac-

count of the wrongful acts of its cashier, Mack A. Mitchell, in accordance with the conditions, covenants and stipulations to be contained in a written bond of indemnity and not otherwise.

IV.

For answer to Paragraph 4 of the complaint this defendant denies the same and each and every allegation therein contained, except that the said defendant admits that it agreed to indemnify the said plaintiff in accordance with the terms, conditions, covenants and stipulations of such bond of indemnity as it would issue, and not otherwise.

V.

For answer to Paragraph 5 of the said complaint this defendant denies the same and each and every allegation therein contained.

VI.

For answer to Paragraph 6 of the said complaint this defendant admits that on or about the first day of May, 1906, the said plaintiff did pay to the defendant the sum of one hundred (\$100.00) dollars as premium upon a bond written for the period of one year from the first day of April, 1906, to the first day of April, 1907; and admits that the said defendant did at the said time, make, execute and deliver to the said plaintiff its certain fidelity bond, the terms of which are as set forth in Exhibit "A," attached to the complaint; and denies each

and every other allegation in the said paragraph contained.

VII.

For answer to Paragraph 7 of the said complaint, this defendant admits that by the terms and conditions of the said bond, the said defendant guaranteed to make good and reimburse to the said plaintiff such pecuniary loss as might be sustained by the said plaintiff by reason of fraud or dishonesty of the said Mack A. Mitchell, in connection with the duties of his office or position, amounting to embezzlement or larceny, and which should have been committed during the continuance of the term of said bond, to-wit, within one year from the first day of April, 1906, or any renewal thereof, and discovered during said continuance or within six months thereafter, but denies each and every other allegation in said paragraph contained.

VIII.

For answer to Paragraph 8 of the said complaint, this defendant admits that from year to year until the first day of April, 1913, said bond was renewed according to the terms expressed in a contract of renewal issued each year as is set forth in Exhibit B attached to the plaintiff's complaint, and denies each and every other allegation in said paragraph contained.

IX.

For answer to Paragraph 9 of said complaint, this defendant admits that the said renewals and extensions until the first day of April, 1913, were made in the same way and in the same manner as the one attached to the complaint, marked Exhibit B, and were of like tenor and effect, and denies each and every other allegation in said paragraph contained.

X.

For answer to Paragraph 10 of the said complaint, defendant admits that on or about the 25th day of November, 1913, a bond, in terms and figures as is set forth in Exhibit C, attached to the complaint, was delivered to this plaintiff, but denies each and every other allegation in said paragraph contained.

XI.

For answer to Paragraph 11 of said complaint, this defendant denies the same and every allegation therein contained.

XII.

For answer to Paragraph 12 of said complaint, this defendant admits that on or about the 9th day of December, 1913, the said plaintiff did serve upon the local agent and representative of the defendant corporation and did mail to the defendant at its head office at Baltimore, Maryland, a certain notice in writing, a copy of which is attached to the com-

plaint, marked Exhibit B, but denies each and every other allegation in said paragraph contained.

XIII.

For answer to Paragraph 13 of said complaint, this defendant admits that the matters and things in said paragraph set forth were stated and set forth in said Notice marked Exhibit B.

XIV.

For answer to Paragraph 14 of said complaint, this defendant admits that on or about the 7th day of December, 1913, the said plaintiff did serve upon the said defendant, a notice, claim and demand, as is set forth in Exhibit E attached to the complaint, but denies each and every other allegation in said paragraph contained.

XV.

For answer to Paragraph 15 of said complaint, this defendant denies the same and every allegation therein contained, and especially denies that the said Mack A. Mitchell was guilty of having wrongfully, dishonestly or fraudulently or at all, taken or abstracted from the plaintiff bank any sum of money in excess of Twenty-five thousand (\$25,000) dollars, or any other sum, or at all, and denies that as set forth in said complaint, or at all, the said Mack A. Mitchell did wrongfully or unlawfully take, abstract or remove from the said plaintiff bank a sum of money in excess of Twenty-five thousand

(\$25,000) dollars or any other sum; and denies that said defendant corporation was or is liable to the said plaintiff to the extent of Twenty-five thousand (\$25,000) dollars, or for any other sum, or at all.

XVI.

For answer to Paragraph 16 of said complaint, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the matters or things set forth in said paragraph.

XVII.

For answer to Paragraph 17 of said complaint, this defendant denies the same and every allegation therein contained.

XVIII.

For answer to Paragraph 18 of said complaint, this defendant denies the same and every allegation therein contained.

XIX.

For answer to Paragraph 19 of said complaint, this defendant denies the same and every allegation therein contained, and specifically denies that the said defendant now or at any time seeks to repudiate or has at any time repudiated its entire or any liability or obligation upon any bond of indemnity made between plaintiff and defendant.

XX.

For answer to Paragraph 20 of said complaint, this defendant denies that there is now due or

owing from said Mack A. Mitchell on account of the matters or things set forth in said complaint, any sum in excess of Twenty-five thousand (\$25,000) dollars, or any sum, and denies it has any knowledge or information sufficient to form a belief as to any of the other matters or things set forth in said paragraph.

XXI.

For answer to Paragraph 21 of said complaint, this defendant denies the same and every allegation therein contained.

XXII.

For answer to Paragraph 22 of said complaint, this defendant admits that it denies all liability and obligation to plaintiff and refuses to repay to plaintiff the sum of Twenty-five thousand (\$25,000) dollars or any other sum, and denies each and every other allegation in said paragraph contained.

And for another and first affirmative defense, this defendant avers:

I.

That on or about the first day of April, 1906, the said defendant did make, execute and deliver to the said plaintiff its certain bond of indemnity, in words and figures as set forth in Exhibit A attached to the complaint herein. From year to year thereafter, upon the first day of April, and thereafter, including the first day of April, 1912, said bond was renewed by the issuance to the said plaintiff of a

renewal certificate each year, in words and figures as is set forth in Exhibit B, attached to the complaint of the plaintiff, and not otherwise.

II.

On the first day of April, 1913, said bond of indemnity, renewed as heretofore set forth, together with all liability thereunder, finally expired and terminated.

III.

That no notice or claim of the discovery of any alleged loss, if loss there was, or act capable of giving rise to any claim under said bond, committed during the continuance of the terms of said bond, or any renewal thereof, discovered during the continuance or any renewal thereof, or within six months thereafter, was made at the earliest practical moment after the discovery of such alleged loss or act, if such loss or act there was, as provided in said bond.

IV.

That the plaintiff herein did not, within six months after the first day of April, 1913, or at any time prior to the 9th day of December, 1913, give notice to the defendant of the discovery of any act capable of giving rise to a claim under the said bond dated April 1, 1906, and the renewals thereof, and did not at any time within six months after April 1, 1913, or at any time prior to the 9th day of December, 1913, make any claim in writing or other-

wise against the defendant because of any of the alleged fraudulent or dishonest acts of the said Mack A. Mitchell, contrary to the conditions and provisions of said contract.

And for another and second affirmative defense, this defendant avers:

I.

That after the termination of said bond and the various renewals thereof as aforesaid, on April 1, 1913, and on or about the 25th day of November, 1913, the said plaintiff made application to the said defendant for the issuance to it, the said plaintiff, of a bond indemnifying the said plaintiff against such alleged pecuniary loss as it, the said plaintiff, should sustain on account of alleged loss accruing by the act or acts of the said Mack A. Mitchell.

II.

That at said time the said plaintiff well knew of all the acts of the said Mack A. Mitchell as set forth in the complaint herein, and well knew all the matters and things pertaining to said alleged loss claimed to have been occasioned by the acts of the said Mack A. Mitchell to the plaintiff; and that at said time the said defendant had no knowledge or means of knowledge of any of the said alleged acts of the said Mack A. Mitchell or of any of the matters or things pertaining to the said alleged loss on account of the said alleged acts of the said Mack A. Mitchell; that thereupon the plaintiff did repre-

sent to this defendant that there had been no acts of fraud, theft, larceny, embezzlement, wrongful abstraction or misappropriation or any criminal act by the said Mack A. Mitchell or any act so as to occasion any alleged loss to the plaintiff, and did conceal from the defendant all of the alleged wrongful acts of the said Mack A. Mitchell, and that the plaintiff did represent to this defendant that the accounts of the said Mack A. Mitchell were in all particulars correct; that thereupon the defendant, relying upon said representations and in ignorance of all of said alleged acts of the said Mack A. Mitchell, and not otherwise, did execute and deliver to the plaintiff the said bond, a copy of which is attached to the complaint herein, marked Exhibit C, and did accept said premium of Sixty-two and 50/100 (\$62.50) dollars, and did not thereafter discover that the said plaintiff did claim that the said Mack A. Mitchell had been guilty of any alleged fraudulent or wrongful acts until on or about the 10th day of December, 1913, and that immediately upon the discovery by the defendant of the plaintiff's claim herein, and that the plaintiff, on the said 25th day of November, 1913, had concealed from the defendant the alleged wrongful and fraudulent acts of the said Mack A. Mitchell on said 10th day of November, 1913, the said defendant did tender to the plaintiff the repayment of said Sixty-two and 50/100 (\$62.50) dollars, which said tender was refused by the plaintiff, and the defendant ever

since has been and is now ready and willing to repay and return to the plaintiff, and does hereby offer to return and repay to the plaintiff, the said sum of Sixty-two and 50/100 (\$62.50) dollars paid to the defendant by the plaintiff as premium upon said bond. That by reason of the premises the said bond, a copy of which is attached to plaintiff's complaint herein as Exhibit C, became and was and is null and void.

And for another and third affirmative defense, this defendant avers:

I.

That at the time of the issuance of said bond, to-wit, on April 1, 1906, and at time of the various renewals thereof, as heretofore set forth, and as a condition of the issuance of said bond and the various renewals thereof, the said plaintiff did agree with the said defendant that it would from time to time make new and proper examination of the books and accounts of the said Mack A. Mitchell and the said Miners and Merchants Bank, to the end that any alleged loss because of any act of the said Mack A. Mitchell, fraudulent or otherwise, might be timely discovered and reported to this defendant. Notwithstanding said agreement, this plaintiff wrongfully failed and neglected to make from time to time, or at all any sufficient or other examination of the books or accounts of the said Mack A. Mitchell, or the said Miners and Merchants Bank; that had the said examination as agreed as aforesaid been

made, any alleged loss occasioned by any act of the said Mack A. Mitchell, if loss there was, would have been prevented.

And for another and fourth affirmative defense, against the matters and things set forth in Paragraphs 4, 5, 7, 8, 9, 11, 17 and 19, this defendant alleges:

I.

That the said alleged agreement, contract or promise set forth and referred to in said paragraphs, was not in writing, nor was any note or memorandum thereof at any time in writing signed by the parties to be charged therewith, or any person by it lawfully authorized or at all, and that said alleged agreement, contract or promise set forth and referred to in said paragraphs, is void under the provisions of Section 5289 of *Remington & Ballinger's Annotated Codes and Statutes of Washington*.

Wherefore, this defendant prays that it may go hence with its costs.

McCLURE & McCLURE and

HUGHES, McMICKEN,

DOVELL & RAMSEY,

Attorneys for Defendant.

STATE OF WASHINGTON, }
COUNTY OF KING. } SS.

John C. McCollister, being first duly sworn, on

oath deposes and says: I am the resident manager and statutory agent for the State of Washington of the above named defendant, and make this verification in its behalf. I know the contents of the foregoing Answer, and believe the same to be true.

JOHN C. McCOLLISTER.

Subscribed and sworn to before me this 13th day of July, 1914.

C. P. GOEMMER,

Notary Public in and for the State
(Seal) of Washington, residing at Seattle.

Indorsed: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

REPLY OF PLAINTIFF.

Comes now the plaintiff and for reply to the answer of defendant, and for reply to the first affirmative defense of said answer, denies and alleges:

I.

For reply to paragraph III of said affirmative defense plaintiff denies the same and the allegations therein contained.

II.

For reply to paragraph IV admits that it gave no notice to defendant prior to the 9th day of December, 1913, but denies each and every other allegation and averment in said paragraph contained.

SECOND.

Plaintiff for reply to the second affirmative defense of the defendant denies and alleges:

I.

For reply to paragraph I, denies the same and the allegations of said paragraph as therein made and contained.

II.

For reply to paragraph II admits that on or about the date named the defendant tendered to plaintiff the premium of \$62.50 and admits that said tender was by the plaintiff refused; admits the execution of the bond attached to the complaint of plaintiff and marked Exhibit "C" and admits the delivery of said bond by defendant to plaintiff, and denies each and every other allegation and averment in said paragraph contained.

The plaintiff further replying to defendant's second affirmative defense, alleges:

III.

That said bond marked Exhibit "C" and attached to the complaint of plaintiff was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance to plaintiff, as, for and on account of the said Mack A. Mitchell, as cashier of plaintiff bank, and was and is a continuation of said fidelity

insurance and contract. That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, as fully set forth in the complaint herein, and for the consideration of the premiums paid and without any further or additional application having been made therefor.

IV.

That there was a slight delay in the execution and delivery of said bond, but that said delay was caused by the neglect of defendant, and without notice or knowledge on the part of plaintiff. That same was caused through no fault or neglect of plaintiff, but was caused wholly through the fault, carelessness and neglect of the defendant in failing to keep and perform its agreements with plaintiff and by reason of the careless and negligent manner in which the defendant managed and conducted its business in connection with said transaction and bond. That defendant, although having at all previous renewals dealt with plaintiff's officers in Seattle, Washington, for the continuous period from April 1st, 1906, and having at all times collected its premiums from the officers of plaintiff in Seattle, Washington, did nevertheless wrongfully and carelessly and negligently and knowingly take up the matter of continuing said bond for the year 1914 directly with the said Mack A. Mitchell, and that instead of renewing said bond as it had agreed

and had been wont to do, did write to said Mitchell at Ketchikan, Alaska, inquiring if he, (Mitchell) wanted said bond renewed. That this communication with Mitchell was without the knowledge or consent of the officers of plaintiff and at a time when plaintiff was relying wholly upon defendant to renew said bond. That the said Mack A. Mitchell being then short in his accounts (of which the plaintiff had no knowledge) and knowing that he had breached and violated the terms and conditions of the bond, and that he had wrongfully removed, appropriated and embezzled the money, all fully as alleged in plaintiff's complaint, notified the defendant by letter that he, the said Mack A. Mitchell, did not want the bond renewed. That said notification on the part of the said Mack A. Mitchell was in writing to the defendant company and upon a letter head of the plaintiff bank, showing and stating that the officers of plaintiff were and at all times had been residents of Seattle and all gentlemen well known and known to the officers and representatives of defendant, and that said Mack A. Mitchell was not himself an officer of the bank. That all of this was without the knowledge or consent of the plaintiff and without any knowledge that anything was wrong with the accounts of said Mitchell. That immediately upon the discovery upon the part of plaintiff bank that there had been a delay in the renewal of said bond, it in turn called the attention of the defendant to the oversight and neglect of the

defendant in failing and neglecting to deliver to plaintiff its renewal bond; whereupon the defendant immediately recognized and admitted its oversight and neglect in the matter and did voluntarily and forthwith execute said bond (plaintiff's exhibit "C") to the plaintiff.

THIRD.

Plaintiff for reply to the third affirmative defense of the defendant, denies and alleges:

I.

For reply to paragraph I of said affirmative defense denies the same and the allegations and averments therein contained.

For a further reply to said third affirmative defense the plaintiff alleges:

That the defendant has fully waived the right to set up or plead the matters alleged in said affirmative defense and is estopped from making and asserting any such claim or defense for the following reasons and upon and following grounds, to-wit:

FIRST: That no such agreement, contract or arrangement as therein alleged and set forth was or is contained in or upon the policy of insurance or any renewal thereof, delivered to the plaintiff by defendant. That no agreement or arrangement of the nature pleaded has at any time been in the possession of the plaintiff and has never at any time

been by defendant delivered to plaintiff, its officers or agents, and no such agreement or contract as alleged and set forth in said affirmative defense has ever at any time during all the period mentioned in the complaint of plaintiff, been in the possession or under the control of plaintiff or within the knowledge of plaintiff, but that if any such agreement or arrangement was at any time attempted to be made, the same has been by the defendant at all times retained and kept by it in its possession and under its control.

SECOND: That it has at all times been well known and understood by defendant that the banking house of plaintiff has at all times been and is now located at Ketchikan, in Alaska. That it was at the time the original bond was written and has at all times since been well known to defendant that said bank was so located in Ketchikan, Alaska, and at a great distance from Seattle, Washington, the home office of the corporation, and that it would at all times be and has at all times been impractical, inconvenient, expensive and unreasonable to attempt to make such examinations of said bank or of the accounts of the cashier (who was at all times at Ketchikan) and particularly and especially such examinations or accounts as it is now alleged it was agreed should be made. That, therefore, defendant well knew and understood at all times that it would not be convenient, practical or reasonable to expect that such examinations or accounts would

or could be made, and that there was no agreement that any such examinations would be made. That the defendant well knowing the long distance which Ketchikan was and is from the city of Seattle, and that Mitchell was to be and operate the bank at Ketchikan, and well knowing and understanding all of the above and foregoing facts and conditions, and the manner in which the accounts were to be kept and examined, did write and deliver said bonds and renewals and accept the premiums therefor, well knowing and understanding that examinations such as it has now asserted should be made would never at any time be made, and that plaintiff had never contracted to make any such examinations Plaintiff alleges and asserts that it at all times fully complied with all the requirements of any agreement existing between itself and the defendant, regarding accountings by Mitchell, and with all provisions of the law in relation to any checking, verification or examination of the accounts of said Mack A. Mitchell, or said bank and at all times has fully kept and performed every promise, statement or representation made by it to defendant.

THIRD: That no written applications or statements or representations were at any time required by defendant or given by the plaintiff after April 1, 1906. That the defendant executed the successive renewals of said fidelity insurance from year to year without any written statement, representation or warranty or any written applica-

tion of any kind or character having been required or made by the plaintiff. That the defendant from year to year executed the new contracts of insurance and collected premiums thereon, and executed renewal certificates and did from year to year receive the premiums for said insurance without plaintiff having made or being required to make any representation, promise or guaranty in relation to the examination, verification or checking of the accounts of the said Mack A. Mitchell, and the plaintiff has at all times fully complied with all the terms, conditions and provisions of any and all agreements existing between it and the defendant, and all lawful requirements in relation to or in connection with the said fidelity insurance and bonds.

FOURTH.

For reply to the fourth affirmative defense the plaintiff denies the same and the allegations and averments therein contained.

WHEREFORE the plaintiff, having fully replied to the answer of defendant, prays for judgment as in its complaint.

JOHN W. ROBERTS,
Attorney for Plaintiff.

STATE OF WASHINGTON, }
COUNTY OF KING. } SS.

L. H. WOOLFOLK, being first duly sworn, upon oath deposes and says:

That he is the Secretary of Miners & Merchants

Bank, a corporation, plaintiff herein; that he makes this verification for and on behalf of said bank being thereunto duly authorized; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

L. H. WOOLFOLK.

Subscribed and sworn to before me this 24th day of July, 1914.

JOHN W. ROBERTS,

Notary Public in and for the State
of Washington, residing at Seattle.

Indorsed: Reply of Plaintiff. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 24, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

DECREE.

This cause came on regularly to be heard before the Honorable Jeremiah Neterer, Judge, and a jury. The plaintiff was present in Court by John W. Roberts, its attorney, and the defendant by Hughes, McMicken, Dovell & Ramsey and McClure & McClure, its attorneys. Both sides having announced themselves ready for trial a jury was called and duly empaneled, accepted and sworn to try the cause. Opening statements were made to the jury by counsel for respective parties.

WHEREUPON Counsel for the defendant before the offer of any evidence upon the part of the plaintiff, moved the court to exclude from the con-

sideration of the jury all testimony upon any part of the allegations of the complaint of plaintiff, save and except such as should relate to any loss claimed under the bond bearing date of April 1st, 1913. After argument of counsel upon said motion the court sustained and granted the said motion of defendant, to which ruling of the court the plaintiff duly excepted and exception allowed.

THEREUPON The defendant offered, upon conditions stated in the record at the time, to allow judgment in favor of the plaintiff and against the defendant on account of the loss claimed by plaintiff upon the bond dated April 1st, 1913, for and in the sum of \$688.27.

THEREUPON Counsel for the plaintiff asked permission to be allowed to prove and made offer to prove the fact, that the bond of April 1st, 1913, was a renewal bond and given in pursuance of previous arrangement and agreement for the continuation of the insurance and as a renewal and continuation of the former bond, and to prove the allegations of its complaint, to which offer of proof counsel for defendant objected on the ground that said contract of April 1, 1913, is a contract complete and unambiguous in itself and not subject to be enlarged or attached by extraneous evidence, and the further reason that such evidence would not be material or relevant to any of the issues, and the objection was by the Court sustained, to which ruling of the court the plaintiff duly excepted and exception allowed. It is therefore by the Court

ORDERED, ADJUDGED AND DECREED
That the plaintiff, Miners & Merchants Bank, do have and recover of and from the defendant, United States Fidelity & Guaranty Company, judgment for and in the sum of \$688.27, together with interest thereon at the rate of six per cent. per annum from the 9th day of December, 1913, until paid, and for all proper costs and disbursements of the action. To which judgment the plaintiff excepted and exception allowed.

Dated at Seattle, Washington, this 22d day of June, 1915.

ENTER: Jeremiah Neterer, Judge.

Indorsed: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 22, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

MOTION FOR NEW TRIAL.

Comes now the plaintiff, Miners & Merchants Bank, and makes this its motion for a new trial in this cause, and doth hereby and now move the court to vacate and set aside, and hold for naught, its former decision, order and judgment in this cause, and to grant a new trial to the plaintiff herein, for the reason and upon the ground that the Honorable Court erred—

1st. In sustaining the motions made by the defendant to exclude testimony on behalf of the plaintiff, and in sustaining the motions of the de-

fendant to exclude all testimony except such as related to the bond of April 1st, 1913.

2nd. In sustaining the motion of defendant to exclude the testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1st, 1912.

3rd. In sustaining the motion of defendant to exclude all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1st, 1913.

4th. In refusing to allow the plaintiff to offer proof to sustain the allegations of its complaint, and in refusing to allow plaintiff to introduce evidence to establish the facts which it offered to prove.

5th. In excluding the offer of testimony on behalf of the plaintiff to prove the allegations of its complaint and to prove that the bond was at all times during the periods named in the complaint, renewed and continued in force, and in refusing to allow plaintiff to prove that the bond of April 1st, 1913, was a continuation and renewal bond, and by agreement between the parties was to be at all times so treated and understood.

Dated June 4th, 1915.

JOHN W. ROBERTS,

GEORGE L. SPIRK,

Attorneys for Plaintiff.

Indorsed: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 15, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

ORDER OVERRULING MOTION FOR NEW TRIAL.

This cause having come regularly on to be heard upon the motion of the plaintiff for new trial, before the Honorable Jeremiah Neterer, Judge of this Court, and the Judge who tried the cause, plaintiff being present by John W. Roberts and George L. Spirk, its attorneys, and the defendant by Hughes, McMicken, Dovell & Ramsey, and McClure & McClure, its attorneys, and the Court having heard the argument of counsel, and being fully advised in the premises, doth

OVERRULE and DENY the motion of the plaintiff for new trial, to which ruling, the plaintiff duly excepted and exception allowed.

Dated this 21st day of June, A. D. 1915.

Enter: Jeremiah Neterer, Judge.

O. K.—W. T. Dovell.

Indorsed: Order overruling motion for new trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 21, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the
Western District of Washington,
Northern Division.*

No. 2750.

MINERS & MERCHANTS BANK, a corporation,
Plaintiff,

vs.

UNITED STATES FIDELITY & GUARANTY
CO., a corporation, *Defendant.*

PLAINTIFF'S PROPOSED BILL OF
EXCEPTIONS.

BE IT REMEMBERED, that heretofore and on, to-wit: the 9th day of June, 1915, the above entitled cause came regularly on for trial in the above entitled court before Honorable Jeremiah Neterer, Judge Presiding;

The plaintiff appearing by John W. Roberts, Esq., its attorney and counsel;

The defendant appearing by Henry F. McClure, Esq., of Messrs. McClure & McClure, and by William T. Dovell, Esq., of Messrs. Hughes, McMicken, Dovell & Ramsey, its attorneys and counsel;

Whereupon, the following proceedings were had and done, to-wit:

A jury was duly empanelled and sworn to try the cause;

Whereupon Mr. John W Roberts, attorney for the plaintiff, made the following opening statement to the jury:

MR. ROBERTS: May it please the Court, and

you, ladies and gentlemen of the jury:

This case is somewhat complicated, and I desire to state to you as clearly as I may at this time just what we expect the evidence will develop. To begin with, the Miners & Merchants Bank was organized for the purpose of transacting a banking business at Ketchikan, Alaska. It had a paid up capital stock of \$30,000.00, with an authorized capital stock of \$50,000.00. At the time it began its banking operations it procured the defendant in this action to write a surety bond, or, what is known as a fidelity bond, upon its cashier, Mr. Mack A. Mitchell, who was to be in charge, and who was in charge, and in entire charge, of the operation and management of the bank at Ketchikan, Alaska. The officers of the bank were Mr. James F. Lane, Mr. L. H. Woolfolk, who sits here, and Mr. Andrew Chilberg. Those gentlemen all live in Seattle. They constituted its board of trustees from the time of its organization until the 29th day of November, 1913, when one change was made in the board of trustees, Mr. Ed Chilberg taking the place of Mr. Andrew Chilberg. But Mr. Ed. Chilberg was not an officer of the bank, nor a trustee, nor connected in any way with its management, until November 29th, 1913. This bond was procured, as I said, at the beginning, and guaranteed, as we contend, the bank against any loss through any

fraud or dishonesty on the part of Mr. Mitchell, which the bank suffered or sustained.

This bond was renewed from year to year. We allege, and expect the evidence to show to you, that the arrangement and agreement was made at the time the bond was written, that the agents of the surety company should, from year to year renew the bond. The company did renew the bond from year to year, each time renewing it before the expiration of the year, and that the bond continued in force until after the occurrences for which the action is brought.

Mr. Mitchell went to Ketchikan, Alaska, which is a distance of some six hundred miles from Seattle. In our complaint, I notice, we have alleged four hundred miles, but as a matter of fact, it is something over six hundred miles away from Seattle. It was at all times known to the surety company that the business of this bank was to be transacted in Ketchikan, Alaska, and that Mr. Mitchell was to transact that business at Ketchikan, Alaska; and Mr. Mitchell went to Alaska, and made his home there, and has lived there in Alaska from that time until the present. He remained as cashier of the bank until discoveries were made which brought about this suit, when he was removed from that position. Now, we expect that the evidence will disclose that some time in the latter part of 1910, or early in the year 1911,

Mr. Mitchell entered into an arrangement with one Wurzburg, whereby Mitchell and Wurzburg formed a corporation. That corporation was to be known as the Revilla Reduction Works. It was to have a capital stock of \$10,000.00, and in the minutes of their meetings it is set forth that Mr. Mitchell was to be a trustee and secretary and to be paid, and to have and receive for his service in financing this company, and in assisting to promote it, sixty shares of the capital stock of that corporation, to be issued to him fully paid. That Wurzburg was to have for his services in promoting this corporation, another part of the capital stock, and then they recited that the capital stock of the corporation to the amount of \$6,000.00 was fully paid. They were going to engage, so they said, in making oil out of shark livers. They were going to catch sharks and take their livers and make oil out of the shark livers. So they bought a boat and paid \$25.00 for the boat, to go out and catch the sharks. Then Mr. Wurzburg borrowed \$3,500.00 from the bank. He had borrowed that before, I should have stated. He borrowed that before. That was checked out, how, we cannot tell, because, while we have the books, they do not show how that money was checked out. But anyhow, they employed a carpenter to build a shed. He built the shed. This corporation gave him its note for \$800.00, and Mitchell for the

bank immediately took up that note. Then they turned the shed in for about \$4,000.00 to help pay up the capital stock of the corporation. Then this \$3,500.00 that had been borrowed by Mr. Wurzburg, was paid back by giving the note of the fish company to the bank to take up Wurzburg's individual note. Then they said that, "we have four hundred shares of stock here that have not been paid for." They called that preferred, and turned it over, they say, to the bank. They took, themselves, the paid up stock, and turned over to the bank that that was not paid, to secure the bank for these notes. But we expect the evidence will show you that, as a matter of fact, not one dollar was ever paid of that capital stock, and that nothing went into this shark liver oil company, except what was taken from the bank, and all this appears in minutes over Mr. Mitchell's signature. They went on with this shark liver oil business for a while, and the sharks refused to come in and deliver up their livers, so they held a meeting and recited that the business had proven a failure, because they could not catch enough sharks. They couldn't get sharks but they got the bank all right, up to that time, to the extent of sixteen or seventeen thousand dollars. At the very time that they recited that the shark business had proven a failure, they owed the bank between sixteen and seventeen thousand

dollars. So, then, they got together and said, "This business is a failure, because we cannot catch sharks. We will start a new one." And they did start a new one, and they called that, —they simply changed the name. They did not organize a new company, but they changed the name of the shark liver company, and called it Revilla Fish Products Company, and they were going to make fish pudding. Then they started in to make fish pudding. Now, they had borrowed up to that time, some six or seven thousand dollars more than their entire capital stock, and more than half of the paid up capital stock of the bank, so I think that it probably did not look well to them; but the evidence will show that anyhow they said, "We will increase our capital stock now." So they recite that they increased the capital stock. Of course, they didn't get any more money into it, but they just increased the capital stock. Now, at first Mr. Mitchell took notes to the bank for the money that he put into this corporation from the bank. He took notes up to the value of \$6,000. Then he stopped taking notes, but he drew through his fish corporation, overdrafts on his bank. And from that time on, these overdrafts, from day to day, accumulated until the overdrafts alone amounted to more than \$40,000. Now, these overdrafts, you will bear in mind, were all in addition to the money which

he had loaned, and for which he took the notes. We will eliminate practically, the notes, so far as the charges here are concerned, because the notes were entered by Mr. Mitchell in the books of the bank, as loans. But these overdrafts were never entered in the books of the bank, and were at all times concealed from the officers of the bank. Mr. Mitchell, the evidence will show, in order to cover up these overdrafts that he was taking out for his shark and fish pudding scheme, concealed it by falsifying the books of the bank; that he not only falsified the books of the bank, but he falsified the reports required to be made annually to the government. He, being at this great distance, was at Seattle, I think, only twice during the period covered by these transactions. But under the law of Alaska a sworn report must be filed by the bank each year. Mr. Mitchell prepared those annual reports. They are in Mr. Mitchell's handwriting. He would, however, send them down here to Seattle, because they had to be sworn to by the president of the bank, and by the secretary of the bank under the law. Mr. Mitchell would make out these reports and send them to Seattle, with the exception of two occasions when he came down personally. And he had sent them all prepared ready for Mr. Chilberg and Mr. Woolfolk to sign and swear to, with a letter which said to them that this

was a correct report. And when he was down here, he in person told them that the reports were correct. Mr. Chilberg,—Mr. Andrew Chilberg, and Mr. Woolfolk, relying upon Mr. Mitchell,—and I might digress here to say to you that Mr. Mitchell was well known to these gentlemen before he went to Alaska. They took him from the Scandinavian American Bank as a trusted employe there, and, having every confidence in Mr. Mitchell, sent him up there at this great distance, and put him in complete charge of this banking business. So, when Mr. Mitchell told Chilberg and Mr. Woolfolk that those reports were correct, they believed it. They relied upon it, and they swore to them and sent them to Alaska and filed them from year to year. Those reports, as a matter of fact, were false. Never, in any of those reports, were these overdrafts mentioned. Never, in any of Mr. Mitchell's letters and reports from time to time to the bank, were they mentioned. Never did he tell them of his connection with the fish companies. Never did the officers of the bank know anything of the transactions. Mr. Mitchell, when he was here in person, told them that those reports were correct, and told them that he never had had an overdraft in the bank.

Mr. Mitchell made a loan to one Rudd, and to secure that loan he took a gold watch. He made another loan to another gentleman, and

took some jewelry as security. He kept that watch and that jewelry for a certain length of time, which will all be disclosed to you here. Then he charged these two notes to expense account, took the jewelry and traded it off for a phonograph and some records, of the value of \$225.00, and took the phonograph to his own home, and has it there at this time, so far as we know. He never made any accounting of any kind to the bank, never charged these notes off to profit and loss, but charged them into the expense account of the bank, and himself received and kept the proceeds of the jewelry which had been put up to secure those notes. There are some other transactions, perhaps, that will develop, but the overdrafts are the chief ones. Now, the officers of the bank, early in December, learned that perhaps all was not right with the bank, and they discovered that there was a run on the bank. As I said, the bank up to this time, never had more than \$30,000.00 of paid up capital, while Mr. Mitchell had turned over to his shark fish company more than \$50,000.00 from the bank with a capital stock of only \$30,000.00, which meant he was giving his fish company, the stockholders and depositors money. An expert accountant, Mr. Larson, was sent up, and after some days there, in talking with Mr. Mitchell, and examining the books, of the bank, he discovered that he

was unable to balance the books. Whereupon, Mr. Mitchell said to him that he had something back in the vault which would make them balance. And when Mitchell went back into the vault and brought out some sheets of paper, and on those sheets of paper he had a memorandum of these overdrafts, showing, so far as we know, a correct list of the overdrafts. That is to say, we only know what those sheets of paper show,—those sheets we have, and they will be in evidence before you. These overdrafts were not in the books of the bank, had never been entered into the books of the bank, and were not in the books of the bank at that time. Later, when Mr. Mitchell was asked why he had concealed these transactions, he stated that he did so because he knew he would not have been permitted to do it, and that he knew that it was wrong, and that it had been a source of great worry to him, etc. Now, we then gave notice, as the evidence will show, to the surety company. The bond was first written in 1906, and renewed each successive year, including the year 1913, and until April 1, 1914, and the premium paid to the company by the bank. The bank paid that premium, not Mr. Mitchell. The bank procured the bond itself, and paid the premium. Upon taking the matter up with the surety company it denied liability, and denies it now, and this action has been brought

to recover, not all the loss sustained, but \$25,000.00, because \$25,000.00 is the full penalty of the bond. While the loss to the bank has been more than \$50,000.00 we can recover only \$25,000.00, because that is the amount of the bond. So, we are asking now, to recover here at your hands, \$25,000.00 with interest, which is the penalty of the bond.

Whereupon, at the conclusion of the opening statement to the jury, by Mr. Roberts, the following opening statement to the jury, in behalf of the defendant herein, was made by Mr. Dovell:

MR. DOVELL: If the Court please, and ladies and gentlemen of the jury: I desire particularly to make a statement which will disclose the facts which the defendant expects to be developed in this case, and I desire particularly to make it this evening, in order that you may not regard the statement which counsel has made, if your impression is as erroneous as the one which I fear has been left upon your mind by his remarks.

The proposition to which I desire to call your attention particularly, is the one which has been so gracefully passed over by counsel. I expect the evidence to show you that the plaintiff, the Miner's & Merchant's Bank, had no bond of our company. In order that that may be demonstrated to you, it will be necessary that these facts be developed: In 1906 the Miner's

& Merchant's Bank was organized at Ketchikan, Alaska. It was organized by the Scandinavian-American Bank here. Now, the Scandinavian-American Bank is a state bank, and therefore cannot hold the stock of any other bank. So the stock was taken, I believe in the name of Mr. Chilberg, Mr. Woolfolk, and Mr. Lane; but the Miner's & Merchant's Bank of Ketchikan belonged to the Scandinavian-American Bank here, and that was a matter of common knowledge. The Scandinavian-American Bank sent to Ketchikan, to manage that bank there, a Mr. Mack Mitchell, who for a long time, had been in their employ, and for whose business acumen and integrity they were willing to vouch. They sent him up there, and armed him with full authority to conduct the business of that bank at Ketchikan, and during all the time he was there, from 1906 until 1913, made, I believe, but one examination of his accounts, and that was in the early part of his regime there. Such was the trust and confidence they had in him. In 1906 the defendant surety company was represented in Seattle by Calhoun, Denny & Ewing. Calhoun, Denny & Ewing, at that time, I believe, did the bonding business for the Scandinavian-American Bank. One of the officers of that bank, Mr. Woolfolk, I think it was, went to our representative, Calhoun, Denny & Ewing, and secured a bond, which was

the usual bond, paying a premium, I think, of a hundred dollars. Now that bond provided that we should be liable for any loss or injury the Miner's & Merchant's Bank would suffer because of the fraud or dishonesty of Mr. Mack Mitchell, amounting to larceny or embezzlement. Now, you understand, it must be such fraud or dishonesty as by the terms of that bond would constitute larceny or embezzlement. The bonds terminated on the 1st of April of each respective year. The bonds secured in 1906 terminated, I believe, April 1st, 1907; the bond of 1907 terminated April 1st, 1908; and the bonds terminated thereafter respectively on April 1st, 1909; April 1st, 1910; April 1st, 1911; April 1st, 1912. And notice would be sent by our representative, then Calhoun, Denny & Ewing, stating that the bond was about to expire, and a blank form of application would be enclosed; they would fill out the application, and by that application, notify us they desired the bond renewed,—at all times, up to and, I think, including the year 1910. They attached to this application for a renewal, a certificate that they had been examining the accounts of Mr. Mitchell, and that in all respects they were correct, which statements, as I said, of course, were not true. Acting upon that application we issued what is called a renewal slip of the bond each year during these years, the last one

being issued April 1st, 1912. Now, the latter part of 1912, or the early part of the year 1913,—and you will notice, of course, that the last renewal slip would thus carry that bond I speak of down to April 1st, 1913,—some short time before 1913 we changed our agent here, and the new agent, a Mr. McCollister, left the Alaska Building and took up his quarters in the Hoge Building. Now, the interest in the Scandinavian-American Bank in the Alaska Building, of course, is a matter of common knowledge, and upon the removal of our agent from the Alaska Building to the Hoge Building,—and it was entirely legitimate,—the Scandinavian-American Bank took their business from us and gave it to another bonding company which has its offices in the Alaska Building. All the bonds which we had with the Scandinavian-American Bank, or any of the concerns in which it was interested, were terminated,—that is, they permitted us to write no new bonds at all. Now this was some time before April 1st, 1913. April 1st, 1913, or shortly before, however—we followed the usual custom as we do with all bonds—our agents sent them the usual notice that their bond was about to expire, and it was addressed to the Miner's & Merchant's Bank, Ketchikan, Alaska, that being the bank which was bonded. The notice was received, of course, by Mr. Mack Mitchell himself, who was the only

one in the bank at Ketchikan. He, thereupon, notified us that they did not desire a renewal of the bond. We supposed, of course, that they were simply following the course with that bond that they had followed with all the rest of the bonds,—that is, transferred the business to someone else. So this bond, which contained a provision that we would be liable for any loss, only provided that it was discovered during the continuance of the bond, or within six months thereafter. Now that bond contained that provision,—and the reason for that provision, of course, is evident to you,—requiring the banks to make the proper examination in order to determine whether or not their servants are being honest. Bearing that out, we were not liable under that bond which expired April 1st, 1913, unless they discovered the loss within six months. Bear in mind these facts. Along the latter part of May, this Mr. Wurzburg, of whom Mr. Roberts has spoken, came to Seattle. He came with a letter of introduction from Mr. Mack Mitchell. Mr. Mack Mitchell had been down himself and had seen the officers of the bank during the early part of the year. He knew that Mr. Wurzburg was to come down a little later, and so gave him a letter of introduction, and he gave him a letter of introduction to the directing officer,—the head of the bank, Mr. Ed Chilberg. When Mr. Wurzburg

came down he was delayed somewhat by reason of the fact that he had to take a trip to San Francisco before he could take the matter up with Mr. Chilberg, and some time in May he took the matter up with Mr. Chilberg, and told Mr. Chilberg that he owed the Miner's & Merchant's Bank a certain sum of money, and, presumably told him all the circumstances of the transaction. In any event, we find Mr. Chilberg writing to Mr. Mack Mitchell immediately,—I think his letter is dated the early part of June,—desiring that Mr. Mack Mitchell tell him the details, and tell him how much was owing from this company which Mr. Wurzburg represented to his bank. And at once Mr. Mack Mitchell disclosed all the circumstances to him; told him that the company Mr. Wurzburg represented owed the bank some \$50,000. Then they either knew, or they could have known all about the transaction, but they let it go until it came some time in November,—until the time came when the bond which we had given them had expired, when the six months had passed, and the bond was absolutely dead. Then in November some time they come to us and say, "How is it that that bond was not issued in April? We wanted that bond." Of course they had not paid any premium for any bond, but they said, "We want that bond, and will you kindly write it and date it back to April 1st?"

They told us nothing whatever of the fact that Mr. Wurzburg's Company owed them \$50,000. They told us nothing whatever of these circumstances, which, as Mr. Chilberg said in his letter, did not look good to him,—told us nothing of that kind, but concealing that from us, secured a bond dated back to April 1st, and within a few days thereafter claimed payment from us for this loss, which, manifestly, is sought to be recovered upon two bonds,—upon the bond of April 1st, 1911, and upon the bond of April 1st, 1912, which were absolutely dead before they secured that new policy of insurance. And when they came to us the last time they did not ask for a renewal of the old bond. They secured from us an entirely different character of a bond, a new form of bond, a bond, if you please, which would make us liable for any act of fraud or dishonesty of Mr. Mack Mitchell, whether it amounted to larceny or embezzlement or not. In that way, you will observe how we were tricked into writing the last bond. Now, the proposition concerning those bonds, and our liability under those bonds,—our possible liability on those bonds under that state of facts, will be matters of law which I want to present to the court. I need not tell you any more about the facts relative to these bonds.

Very briefly, these are the facts, as nearly

as we know, concerning the relations of Wurzburg and his company and Mr. Mack Mitchell. Mr. Mack Mitchell will be here and will go upon the witness stand, and Mr. Wurzburg, I presume, if the case reaches that point, will disclose the whole transaction. One of the principal industries of Ketchikan, of course, is the fishing industry. Mr. Wurzburg came to Ketchikan. He was a man who had been engaged in the fishing industry in one form or another all his life. He understands it thoroughly, and has been very successful in other places. He has handled large amounts of money in the fishing industry in other points along this coast. He came to Ketchikan with a plan which had been agitated for quite a length of time,—a plan for catching fish, which, as I understand it, came to devour the filth from the canneries, and take the fish and the sharks,—catching them and utilizing a part of them,—the liver,—for the oil, the rest of the fish, as I understand it, to be converted into fertilizer. That was his plan, and he started building in a small way the institution there where he could manufacture this fertilizer, and this oil. He found that was unsuccessful because the run which had been there for years had, for some reason, disappeared entirely. When he began this small plan he convinced Mr. Mitchell that it would be developed into an industry

which would be profitable to that community. And I am convinced that when you hear his testimony you will believe there was excellent reason for that conclusion. But when it was found that the fish could not be secured for this fertilizer, and for making the oil, it was determined to enter upon the manufacture of some food product, to be made out of fish. They then, of course, had to increase their plant. They did develop a food product, called a fish loaf, put up in cans. They had to change their plans. Wurzburg found, as is usually the case, that he had spent a great deal more money than he anticipated, the great difficulty being that he could not get this fish product upon the market until he had spent a certain amount of money for advertising, to introduce it to the trade. Mr. Mitchell, believing that it was a venture which would be successful, had honored his overdraft, and had permitted him to draw for a certain amount. He owed the bank that money. Mitchell became convinced that the only way for the bank to get its money was to keep on putting more money in. And he followed that experience, which is not unusual or uncommon,—putting in good money after bad, until the overdraft had reached, as Mr. Roberts has told you, a sum in excess, I believe, of some \$40,000. The evidence will disclose to you that Mr. Mitchell did not, at any time, make any

effort to conceal these overdrafts. The way he kept his books, which is a way which is not uncommon,—the overdrafts are carried as a separate item, and there was no place for them in any of the reports which he made here. The evidence will show you there were various other overdrafts. There were overdrafts which the Scandinavian-American Bank here knew of, and they were not included upon this report. And an item of earnings of the bank, the interest which was being charged upon these overdrafts, was sent down to the Scandinavian-American Bank, and they saw that item of interest, and they saw what they were earning, and they must have known they were earning a large part of it on these overdrafts. As far as the statement that he concealed the sheet showing these overdrafts in the vault is concerned, he had a system,—a loose leaf ledger system, and so when he removed the sheets from time to time as they had been used, they were, as I understand it, placed in another part of the bank, and that is what Mr. Roberts means when he declares that the attention of this expert was called, finally, to the papers upon which the record of the overdraft were concealed in another part of the bank. So, upon that statement,—and there are many other facts, of course, which I cannot go into in detail now, we expect to

establish first: that the Miner's & Merchant's Bank were not insured, and knew they were not insured with our company at the time this loss was discovered, or within six months thereafter, so that there is no liability for that reason upon the bond. And I expect further the evidence to justify this conclusion, that the venture made by Mr. Mack Mitchell for the Miner's & Merchant's Bank, was made in good faith. By the way, it is a fact that Mr. Wurzburg, when he organized his company there, induced, not only Mr. Mack Mitchell, but several other local parties to go into the corporation, and, as is the custom, gave them a small amount of stock so that they could act as directors. But the evidence will disclose that Mack Mitchell never did, nor did he ever expect to get a dollar of profit out of any money which he permitted the Miner's & Merchant's Bank to advance to this enterprise. And the evidence will, therefore, disclose that this transaction, while it may have been a poor business venture, was nothing more,—did not amount to fraud or dishonesty,—to that fraud or dishonesty which is larceny or embezzlement. Mr. Mitchell has never been proceeded against. He is not only a free man, but today is city treasurer of Ketchikan.

MR. ROBERTS: I would like to make a short reply statement, which I am willing to do now or in the morning, as Your Honor sees fit.

MR. DOVELL: I don't think it is customary to make a reply statement.

THE COURT: I think not, if you set forth your own contention, and counsel rebuts that, it is all.

You, ladies and gentlemen of the jury, will bear in mind the admonitions which I have heretofore given you, and we will take a recess until 10:00 o'clock tomorrow morning.

Whereupon, at 5:00 o'clock p. m. further hearing was continued until Thursday, June 10th, 1915, at 10:00 o'clock a. m.

THURSDAY, JUNE 10th, 1915.

10 o'clock a. m.

TRIAL RESUMED.

(Calling roll of jury waived, by agreement of counsel.)

(Thereupon, by direction of the court, the jury retired from the court room.)

MR. DOVELL: If the court please, I think we can very materially abbreviate this hearing, if the court will hear two motions, which I have to present at this time. Having in mind the pleading and the opening statement of counsel, I move to exclude the testimony touching any alleged loss occasioned by any wrongful acts or conduct of Mack A. Mitchell, occurring prior to April 1st, 1912, for the reason that it appears from the complaint that no discovery

of said alleged loss, or wrongful acts or conduct, was made within six months from April 1st, 1912, the same being the date of the expiration of the bond and renewal, dated April 1st, 1911. And I also move to exclude any testimony touching any alleged loss occasioned by any wrongful acts, or conduct of Mack A. Mitchell occurring prior to April 1st, 1913, for the reason that it appears from the complaint that no discovery of said alleged loss or wrongful acts or conduct was made within six months from April 1st, 1913, the same being the date of expiration of the bond and renewal dated April 1st, 1912. I also move to exclude any testimony as to the so-called oral contract which is set forth in the complaint, for the following reasons: —Your Honor will note, although I don't think reference was made to it by counsel in his opening statement, that in the complaint there is pleaded an oral contract to the effect that we should furnish to the plaintiff the most favorable form of insurance policy. Your Honor will note that in the pleading. Now, I move to exclude any testimony with regard to such contract for the following reasons—

MR. ROBERTS: I might say, Your Honor, that I do not expect to offer any evidence upon that allegation.

MR. DOVELL: All right, then, I will not have to make the motion. That being out of the

case, it will be considerably simplified. Now, Your Honor will note, if Your Honor will turn to the first exhibit attached to the complaint, that in 1906, there was issued to the plaintiff a bond, which provided that we should be liable for "such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employee from the service of the employer." Then follows further on in the bond this provision: "That the company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer, on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

Now, Your Honor will note that each year following April 1st, 1906, there was issued a renewal, which provided—and, by the way, if Your Honor has before you Exhibit “B,” it has been agreed by counsel and myself that there is a mistake in that.

THE COURT: In what respect?

MR. ROBERTS: A mistake was made in copying it Your Honor. Just a clerical error.

MR. DOVELL: “For the period beginning the 1st of April, 1911,” and ending—

MR. ROBERTS: “Subject to the covenants and conditions”—

MR. DOVELL: Right before “subject to the covenants,”—

THE COURT: Yes.

MR. DOVELL: What is the word there?

THE COURT: “Beginning the 1st day of April, 1911, subject to the covenants.”

MR. DOVELL: What is there omitted, Mr. Roberts?

MR. ROBERTS: I think the omission is above there: “Beginning the 1st day of April, 1910”—

THE COURT: 1911?

MR. ROBERTS: 1911.

THE COURT: Yes.

MR. ROBERTS: “1911, and ending”—

THE COURT: And ending?

MR. ROBERTS: “On the 1st day of April, 1912.”

That should go in there. The next word is "subject."

THE COURT: "Subject to the covenants."

MR. ROBERTS: Yes.

MR. McCLURE: That begins on the 1st day of April, 1911, and ends on the 1st day of April, 1912?

MR. ROBERTS: That particular one; yes.

MR. McCLURE: I thought you read it that it began on the 1st day of April, 1910, and ended on the 1st day of April, 1911.

MR. ROBERTS: I started to read that, but I had the other one,—and the one before the court—

MR. McCLURE: Each renewal or continuation certificate is for one year.

MR. DOVELL: Your Honor will note that the renewal certificate contains the provision that it is to be subject to all the covenants and conditions of the original bond. Now, that was continued, according to the allegation of the complaint until the last renewal certificate was issued, April 1, 1912, thus carrying the bond to April 1st, 1913. Now, if Your Honor will note, the next Exhibit, you will find that there is a bond dated April 1st, 1913.

THE COURT: That is Exhibit "C"?

MR. DOVELL: Exhibit "C." You will note that it is a bond of an entirely different character issued by the same company, but containing entirely different covenants. Now, we have

the plaintiff in the peculiar position of suing upon the bond of 1911 and the bond of 1912. According to the statement of counsel, this so-called defalcation began in 1911, and continuing through 1911, through 1912, ran into 1913,—a small amount of the so-called defalcation was during the time of the last bond. But, according to the pleading, it appears the discovery was not made until December, 1913, and it is my position,—and I can see no escape from it,—that all liability upon the bond dated, or evidenced by the renewal dated April 1st, 1911,—that all possible liability on that bond terminated six months after April 1st, 1912; and all possible liability upon the bond dated April 1st, 1912, terminated six months after April 1st, 1913, provided no discovery was made. Now, Your Honor will note the date that it is alleged the discovery was made. That is, about the 9th day of December, 1913, the plaintiff, Miners & Merchants Bank, discovered certain facts in relation to the said Mack A. Mitchell. Note, if you please, again the provisions of the bond, which say the company shall be liable for any loss which may be sustained and discovered during said continuance,—that is, during the continuance of the term of this bond or any renewal thereof, or within six months thereafter, or within six months from the death, or dismissal or retirement of said employee. Now,

it seems to be the theory of counsel, that this bond having been renewed from time to time, operates as a continuous obligation. That, undoubtedly, is his theory, and, of course, Your Honor will have difficulty in shutting your eyes to the character of the transaction, and Your Honor will not fail to understand why they sought to get this last bond: they thought it would operate as a renewal of the old bond. In other words, there had come a time in October, 1913, when the bond had terminated,—when the six months period during which they had to discover a loss had terminated,—when all relations between the parties had terminated,—and the bond, so far as any responsibility or liability was concerned, was absolutely dead. Now, someone conceived the idea that by going to the company, and getting a new bond, they could revivify that old obligation. The idea might have ingenuity, but it had no logic. That bond,—the last bond,—the last renewal was absolutely dead. There was no responsibility or liability upon it. No discovery of any loss had been made within six months from the time that bond terminated. Now, how anyone could conceive the idea that he could give life to that old obligation by getting a new bond,—not a renewal at all, if Your Honor please, but by getting a new bond,—I cannot conceive; and, fortunately, we are not without authority upon the question.

The matter has been squarely decided by the Circuit Court of Appeals, in the Second Circuit. I gave a note of this authority to Your Honor.

THE COURT: I read the case.

MR. DOVELL: Your Honor had occasion to examine it? Now, Your Honor will note that there was a bond, and it was renewed from time to time, and Judge Shipman, in writing the opinion, takes up the items of loss, as they occurred each year. Now, Your Honor will note that there was a bond which contained almost identically the same provision that our bond contained: that there should be but one bond in force at a time. The provision in that bond was this: "And it is agreed further that the company, upon the execution of a stipulated amount of risk or insurance under the terms of this bond in behalf of any employee, shall not thereafter be responsible to the employer under any previous insurance of said employee, it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employe shall be in force at one time, unless otherwise provided."

That is practically the same provision as is in our bond.

Judge Shipman says in the beginning of his opinion,—and this is what he bottoms his opinion upon,—

(Reads from opinion.)

Now, if Your Honor will give the matter a moment's thought, you will understand why the contract must be that way. I venture to say that no liability company could do business and write contracts otherwise. If the contract is as counsel seems to think it is,—a continuous liability, kept alive all the time by these renewals from year to year,—then, there might be a loss,—there might be a defalcation today and and twenty years from now, a liability might be imposed upon the company. No insurance company could do business in that way. No insurance company would know where it was at,—would know what liability it might have to meet. And, for the same reason, if a contract of that kind was kept alive year by year, by renewal, a bank would not exercise those precautions which are necessary to be exercised, not only for our protection, but for the protection of the stockholders and the depositors, and the public generally who do business with the bank.

Just the same thing, if Your Honor please, would occur generally as occurred in this bank,—a man would be sent there to do business, and left there year after year, and no attention would be paid to him, the precaution never being taken to examine his books. Now, it is just for that reason, if Your Honor please, to require that one who secures an indemnity bond upon an employe, shall investigate his conduct

and his books, if he keeps books, at certain periods, and discover whether or not there is any flaw in his integrity. They have all the time while that bond is in force, and they have six months thereafter to make an examination and a discovery, and if they do not, then the liability of the company is at an end. Your Honor can readily see that no liability company could write a policy unless it had some such provision. It would never know that its liability had terminated.

Now, Your Honor will note if you have given attention to this *Florida Central* case (*Florida Central and P. R. Co. vs. American Surety Co. of New York*, 99 Fed. 674) that the only way that the bonds differ is that this was a stricter bond in this case,—it required that the discovery be made during the continuance of the bond,—while the term of the bond still existed, or six months after the death, or dismissal of the employe. Now, our bond is a slightly more liberal bond, inasmuch as it allows six months after the termination of the bond for the discovery. It strikes me that Your Honor would not care to depart from the ruling of the Circuit Court of Appeals of the Second Circuit. While, of course, I do not pretend that Your Honor is bound by that ruling, still it is always desired, I believe, to escape conflict in the different circuits.

In the case of *United States Fidelity & Guaranty Co. vs. Williams*, 49 Southern, 742, a Mississippi case, the court had before it, a bond, I believe, identical with ours. It was a case against the same company. As I understand the case, it was not alleged in the complaint at what time the shortage occurred, and a demurrer was interposed on that ground. Inasmuch as the opinion contains an analysis of the policy, I will take the liberty of reading a portion of it:

(Reads from opinion.)

Now, this is all to the point that each renewal constitutes a new and separate contract, and not, as counsel seems to think, one continuous contract running from the date of the first policy.

In *Brady vs. Insurance Company*, the court said:

(Reads from opinion.)

That is the point exactly. It did not increase or change the time within which they were required to examine their books, and discover this loss during the continuance of the term, or six months thereafter.

(Resumes reading.)

Now, that was their contention. This is what the court said:

(Reads from opinion.)

The court says: "See, also," a case in the

110 Tenn., and a case in the 124 Federal, which I have here.

(Resumes reading.)

The case is directly in point.

I have also a decision by Judge Newman, sitting in the Northern District of Georgia, in a case entitled *Proctor Coal Company vs. United States Fidelity & Guaranty Company*, 124 Federal, 424. Did Your Honor examine this case?

THE COURT: I examined both of them.

MR. DOVELL: Then, there is no reason why I should take up your time, further, except to call your attention to the fact that upon a bond, the language of which appears to be identical with ours, the same contention was made. They say:

“It is contended by the plaintiff in this case that the effect of this original bond and the two renewals, taken together, was to create a continuous obligation. Counsel for plaintiff insist that certain language in the bond shows, and the character of the transaction indicates, that it was intended that the Proctor Coal Company should be insured against any dishonesty on the part of Stanton, occurring at any time from December 1, 1898, up to December 1, 1901, discovered during such period of continuous insurance, or within six months from the expiration of such period.”

Then the Court seems to hold that that contention cannot be sustained. The language of the bond is identical and the case is directly in point.

Now, it is without doubt, the theory of counsel that this bond, being first taken out in 1906, and renewed each year, constituted one continuous contract, making us liable for any loss which occurred any time during that period, and discovered within six months from the date of the expiration of the last bond. For the reasons I have stated, Your Honor will understand that such a contention could not be sustained with any justice to an insurance company.

Of course, while I am willing to concede as far as possible the ingenuity of the parties, who, upon discovering the predicament they were in, secured this new bond, and had it dated back, still it might almost be remarked that they were "hoisted by their own petard." Had they discovered the loss when they probably did discover it—and they admitted their discovery along in June sometime—and proceeded upon the old bond, they might have had a cause of action, provided there was fraud or dishonesty, amounting to embezzlement or larceny in the acts of Mr. Mitchell. But they delayed their discovery until more than six months after the termination of the last bond. Then conceiving the idea that the bond, and its various renewals, constitute one continuous contract, they conclude that if they can get a new bond that will operate as a

renewal of the old bond, although that bond, and all liability upon it, has passed at the time. And they do that, notwithstanding the provision in the bond which terminated on April 1st, 1913, that all liability and responsibility shall end when they secure a new bond. So, putting to one side for the present, the question of the conditions or the circumstances under which they secured this bond dated April 1st, 1913—putting to one side for the present those facts—I contend that that is the only bond upon which there could be any liability, and, therefore, I have moved to exclude testimony as to any loss or defalcation, which occurred, during the life of the other bond.

MR. ROBERTS: If the Court please, in the first place, counsel is assuming for the purpose of his argument, certain facts, which must, of necessity be submitted to the jury. In the next place, I think counsel misapprehends the purport of the provisions of this bond, together with the renewals.

THE COURT: When you refer to the renewal, do you mean the last bond?

MR. ROBERTS: Well, upon that, Your Honor, of course, while counsel has not fully stated it, he has probably understood our contention, in that we contend this is one continuous insurance. To illustrate briefly, Your Honor, counsel stated to the jury on Yesterday that upon the expiration of this bond, or that par-

ticular renewal, that this company wrote a letter to Mack A. Mitchell, offering to renew that bond, showing that it meant to continue it in force at that time, but that that letter having fallen into the possession of Mr. Mitchell, he returned it, saying: he didn't want the bond renewed. Now, that is one of the evidences of their intention to renew. We expect to show that it was the arrangement between these parties that this should be renewed—that the company would keep it renewed, and that it did keep it renewed, and that counsel is mistaken when he says that we would apply each year for that renewal. Your Honor has had some experience with insurance, and I think you know that the insurance company usually beats you to it. They don't wait for you. They usually renew it in advance, for fear some other agency will get it away. They renew it, and they tried to renew this, as Mr. Dovell said, but here are the facts: the bank here at Seattle had procured that bond, in the first instance. It had paid the premium, and the business had all been transacted here, and but for the change of the agency, to which counsel referred, that renewal certificate would have been issued by the old agency. Then, we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this com-

pany, and asked them—called their attention to it, and they then agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way we got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of all the companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally. Now, so much for those questions, all of which are questions of fact for the jury.

I will say this to Your Honor: that I didn't anticipate this argument at this time, because the law questions were before Your Honor on the pleadings, and while I have a brief, I didn't bring up the authorities, but I believe there is enough here to satisfy Your Honor.

First, as to the first case cited by counsel: that, I think, is not at all controlling. It is an entirely different character of bond. That is what is known as a schedule bond. That is a bond—a blanket bond—written to cover all the employes of any particular institution. Those employes change from year to year, or from time to time, rather, and a company is

required to submit annually a new schedule, giving the names of the employes, and as the court says here, they might be willing to bond certain employes, and not other employes, and that that is one of the reasons, which appears from the contract itself why that was to be merely an annual bond. That is set forth here on page 677:

“To make the contract intelligible, it must be read in connection with the schedule register.”

We have nothing of the sort here.

(Reads from opinion.)

Then, in addition to that, Your Honor, that bond carried a rider, which ours does not have, and the court says that they think it is made clear that that was the intention by the rider which is attached. And you will find, by reading that rider, that it says that the bond has been written with the express understanding that the aggregate liability of the American Surety Company “for the acts of any employe under both the bonds herein mentioned shall not during said period exceed the amount of the last guaranty or bond upon the employe for whose acts a claim may be made.” No such provision is in this bond.

Now, taking the other case, reported in the 124 Federal, in which the same company was sued as is sued here, at the time this action

was instituted, I considered this question of whether or not I should sue for this entire Forty-three Thousand Dollars, upon the theory that these continuations rendered this cumulative, and there are three cases which have held that that could be done. The Supreme Court of New York, in a late case, held under this very provision, that they were liable for what was lost under one bond for one year, and they were liable under the other one for the other year, and so on. But I reached the conclusion—and that is what this case says that I am going to read to Your Honor, which Mr. Dovell cited, but did not read—that that was the purpose of those provisions, to-wit, to limit at all times the liability of the surety company to \$25,000.00. But for those provisions, in this bond, we might recover the whole amount that was lost, since they covered him during the whole period, but with those provisions, notwithstanding the loss during the period exceeded \$50,000.00, we are limited in our recovery to \$25,000.00. That has been plainly stated here in this opinion. “In my opinion, the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover within six months after the expiration of the original bond, or any renewal, the dishonest acts of

the employe, and to claim indemnity for the same. The original bond and each renewal stands for the malfeasance of the employe during the continuance of each and discovery within six months after the termination of each. The purpose of the above clause evidently is to avoid double liability on the part of the company; that it shall not be liable beyond the amount of the bond as originally given and renewed." Taking this contract altogether, this, in my opinion, is the proper construction to place upon this clause. That is my contention, if the Court please. Now, I assume that the language of that bond is the same as this one, because it is the same company.

The first clause of the bond says: "Which shall have been committed, during the continuance of said term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employe from the service of the employer within the period of the bond."

Now the language of this bond seems to me to be entirely clear.

THE COURT: I don't care to hear from you upon these various renewals upon this bond, but I would like to hear from you as to the operation of the new bond that was given—the

last bond—whether that was a renewal, or whether that was a separate and distinct obligation.

MR. ROBERTS: Of course, we contend that that was a renewal, Your Honor, to all legal effect the same as if one of these certificates had issued. Of course, if we should fail in that contention, then there would be something in the argument of counsel; but that is a question of fact—as to whether or not it was a renewal.

THE COURT: Wherein do you think it is a question of fact?

MR. ROBERTS: Because of the fact that it was in pursuance of the original arrangement and agreement, which existed between us, and because of the fact that that is what we asked them to do, and because as and for a renewal, that is the bond which they gave us.

MR. DOVELL: I thought you said you didn't intend to prove any oral contract.

MR. ROBERTS: No; I didn't say that. I said I didn't intend to offer any evidence on the allegation to which you referred originally—that they had agreed to give us the best bond available. That was the only thing on which I said I would offer no evidence. The question of whether or not that bond, Your Honor, was a renewal, I think, is clearly one of fact. For instance, it was stated here—and that is the fact—that that bond was given on the 24th of

November, or about that date—the 22nd to the 24th of November.

THE COURT: And dated back.

MR. ROBERTS: Yes, Your Honor. Now, if that were not a renewal, what explanation can be offered for the dating of it back? If that were a new contract—a new bond—it would have to have been dated on the date it was executed, it seems to me, would be, in itself, conclusive evidence that that was a renewal of the original contract, because it takes up the original contract, where it had been dropped, and carries it on. There is no other explanation for the dating back of that bond, and I have authorities cited here in my brief, Your Honor, that a bond of this character, dated back, is effective from the date that it bears.

THE COURT: There could be no doubt of that.

MR. ROBERTS: Therefore, this bond was written not for a year from November 24th, but for one year from April 1st—dated April 1st. And the company accepted a premium for that bond. Now, it is true, I will state—the jury being absent—that they tendered that premium back to us later, and we refused to accept it; but that is all a question of fact, I think, to be determined—In other words—if Your Honor has not read the pleadings recently—it is a question of fact to be determined by the Jury whether or not we defrauded them into the execution of that bond.

THE COURT: The last bond?

MR. ROBERTS: Yes; that last bond. The question of fraud, of course, is always a question of fact, so, I say, everything in connection with that last bond is a question of fact. Now, furthermore, as I have already called to Your Honor's attention, they took no application for this bond. They have none, and can't produce any; showing again that it was not a new bond, and not a new contract; but that it was executed in pursuance of the standing arrangement and agreement between them, that they should from time to time, keep this bond renewed. Your Honor it would be inconceivable that this or any other surety company would date a bond back for six, seven or eight months—I think it is—under any other circumstances than that it was a continuation of that insurance contract.

THE COURT: But here you have a different contract; and the terms are idfferent; the requirements are different. The guaranty is different from the old bond. A company can insure past conduct of a party, as well as future, if that is a part of the contract.

MR. ROBERTS: But we are entitled, as I said, to introduce the evidence here, and it is for the Jury to say whether or not that was a new contract, or whether or not it was a continuation of the old one.

THE COURT: But it speaks for itself. It is in writing.

MR. ROBERTS: That is very true, Your Honor, as to the bond, itself. But here are certain facts and circumstances, which it seems to me, are decisive and conclusive; this bond having been, as I said, dated back to the very day that the other one expired, and it having been executed without any written application, or without any guaranty or promise, and without any statement as to the acts of this man Mitchell—with none of those things. And we have here the letter, as I said, of the company, writing up there, and offering this bond as a renewal.

THE COURT: And your bank didn't take it.

MR. ROBERTS: The bank never knew it, if the Court please. The bank never knew it. Bear in mind that Mr. Mitchell didn't have this bond written on himself, and never did. He had nothing to do with it. He was what is called in insurance the risk. Here is a contract of insurance between the bank and the surety company. Now, then, the company—the excuse is, but it is no excuse—having changed its agents, the agent, instead of renewing that bond to the bank, writes a letter to the risk, and asks him if he wants it continued. Now, then, the risk gets the letters, conceals it from his bank, conceals it from the party that demanded the protection, and should have had the protec-

tion, and sends it back, and says that he does not want it renewed, and the bank knows nothing about it—absolutely nothing about it. It seems to me that that fact alone—and we have pleaded that in the reply—is an act of negligence on the part of this surety company—in sending it directly to the man against whom we desired to carry this insurance and this protection.

THE COURT: It was sent to the bank. I take that from the statements of both of you.

MR. ROBERTS: No, it was sent to Mitchell.

MR. DOVELL: It was sent to Mitchell, yes.

MR. ROBERTS: Now, here originally was the situation—and the facts will develop all of this: that the bank was absolutely owned here; the officers and trustees of the bank were all here; and the surety company at all times knew that. The fact that this new agent may not have known it—and I am not saying now whether he did or didn't—but the fact that the new agent didn't know that is no excuse to the company. They had done all the business here; they had been paid all the premiums here; for eight years, they had collected these premiums. They had collected these premiums for eight years. They had done all the business here. They, themselves, renewed the bond from year to year without any action on the part of the bank. The bank had relied upon them from year to year. And, as I said, had not the agency been

changed, this difficulty would never have arisen. It was overlooked by the bank for that reason. And then, when the bank discovered it, which, as I said, was discovered through the old agency, and not on its own account, they asked for a renewal of that bond, and they are given this other bond. Now, what is the difference, if the Court please. The fact is merely that the bankers' association, whatever the name of that may be, had demanded a change in the form of these bonds, and that change had gone into effect, and they gave that bond, then, as a renewal or a continuation of this contract of insurance.

Now, as I said, we certainly have a right to have submitted to the Jury the question of whether or not there was an agreement to renew this insurance from year to year, and the further question of whether or not there was an agreement that this policy should be a renewal. The only reason why it was in a different form, and contained different provisions, was simply, as I said, that the bankers generally had demanded that the provisions of these bonds should be different, and that was not a special bond in this case. The bond they gave to us as a renewal was the bond they were giving then to all persons—the bond they were giving to any one who made application for like insurance. I can see no difference, if the Court please, whether they had

given us one of these certificates, or whether they gave us, in lieu thereof, the other paper, which is now referred to as the new bond. We want the privilege of showing that they agreed to give it to us as a renewal, and that they did give it to us, as a matter of fact, as a renewal, and we want to submit that question of fact to the Jury; first, that they agreed to give it to us as a renewal; second, that they did give it to us as a renewal of this insurance, and as a continuation of the insurance which we had had, and carried, and paid them for, for eight consecutive years.

Now, if the Court please, counsel has said—and I am not sure whether that is included in what Your Honor said you didn't care to hear from me about—But there is a very late case in the 44th Pacific, entitled *United States Fidelity & Guaranty Company vs. Boley Bank & Trust Company*—the same surety company and the same bond as in suit here. The bailiff informs me that the 44 Pacific is not here. I do not contend that the question in that case was the same question as this new bond matter; but it was a case where the bond had been renewed from year to year; and the court held that the company, having renewed this bond and taken these premiums from year to year, was estopped to raise this question about not having made a proper examination of the bank, and they said that if they desired a more

frequent examination, the company had the power to require the same, "but having continued its bond from time to time upon said representations and for a consideration paid by the bank, it is now estopped to deny liability on the ground that the examinations were made at periods more extended than these originally contemplated."

Now, furthermore—and I will not digress far upon this question, but counsel laid much emphasis upon it—the authority—and I have it here—is that upon the question of examination, the insured is required to do nothing which he did not specifically contract to do along that line.

Now, we did not contract to make an examination in this case. Furthermore, I have pleaded here the circumstances, to-wit: that this business was to be transacted in the District of Alaska—a long distance away—and that the surety company knew and understood that. That will appear from the documents themselves—the original application. And in this case, if the Court please, from which I just read, and which came from Oklahoma, the bond was written upon a negro bank in a negro town.

THE COURT: I am familiar with it.

MR. ROBERTS: And the Court said the surety company knew and understood the character of that town, and the character of the people in charge of that bank, and they knew and under-

stood, and it was their duty, as much as that of the insured, to know the facts and circumstances.

Now, one thing more, Your Honor:—and I would like to have Your Honor take sufficient time to investigate further the authorities—the authorities on the rules of construction, for instance—generally—briefly, of course, as you can't read them all; they are too many; but if, in this matter, there should be any doubt, that doubt must be resolved in favor of the assured.

THE COURT: There is no question about that.

MR. ROBERTS: Now, then, I submit that under the liberal rules of construction, if there is any doubt at all—if there is a question of fact whether or not that bond was given as a renewal, then, it must be submitted by the Court, as a question of fact, to the Jury. Now, if I understand Your Honor's frame of mind—and I think I do, the citation of further authority on my part would not help much.

THE COURT: No. What I want to say is: From the argument, here, it is not necessary to determine whether the renewals from 1906 down to 1913 were separate and distinct contracts or not. That is not in this case, because all those renewals must stand together—that is, as far as this case is concerned at this time, because more than six months had elapsed after

the expiration of the renewal policy, if the last policy is not a renewal; so there is nothing to differentiate with relation to the matter that was before Judge Newman in the Georgia case, and I don't care to hear from you upon that phase, because that is not before the Court here.

MR. ROBERTS: I understand counsel in his argument—and I noted it particularly—to concede that this contract continued in force until April 1, 1913.

THE COURT: Oh, yes. But I rather understood from counsel that each renewal was a separate contract.

MR. DOVELL: Yes.

THE COURT: While it was a renewal, yet the policy stood as a separate and distinct contract, the same as though a new policy had been issued; but it remained in force. That was my understanding, and I say that is not a matter that is before us now. Just what this Court would hold on that if that was before the Court, is not clear.

MR. ROBERTS: That is the way practically that I understood Your Honor. That is to say, the matter narrows itself down with Your Honor to the question whether or not we could prove this last policy to be a renewal of the old contract.

THE COURT: Yes; that is the idea.

MR. ROBERTS: Now, then, I don't know that I can add to that much, if the Court please, in addition to what I have already said; but certainly, certainly, if we can prove that they agreed to renew this old contract, and that they did renew this old contract, the form of the renewal is immaterial. The form is immaterial, and, so far as I am concerned, it would be immaterial to us as to whether we were bound by the terms of the old contract or the terms of the new. That would be immaterial, so far as we are concerned.

In other words, it would be immaterial to us whether or not we were entitled to take advantage of the broader provisions of the new contract; but the case would still have to go to the Jury, because there were losses under the new contract. So, as I said, I think it would certainly not be advisable for the Court to undertake at this time to say in advance of the offering of any testimony that we would not be permitted to offer any testimony in relation to the renewal of this contract.

MR. DOVELL: Maybe we would pay the losses under the new policy.

MR. ROBERTS: The very best answer to that is that you haven't. You have not offered to do so, or intended to do so, but have denied all liability. I think, if the Court please, that we must be allowed to put all the facts before the Jury, and that if Your Honor should later

determine that we were not entitled to this, it could then be taken away, but the evidence would then have been taken, and we would have a record. So I think the Court ought to allow the matter to be submitted, as a question of fact. And, as I said, I would like Your Honor, before finally determining this question, to look into the authorities which I have cited there, and which, while perhaps, not directly in point on this question, yet will certainly throw some light upon it.

THE COURT: I will state, Mr. Roberts, that I read over your memorandum of authorities since yesterday—since Court adjourned yesterday, and likewise yours, Mr. Dovell, and I am thoroughly convinced in my mind that the last bond,—, considering the opening statement to the Jury, and the matters which seem to be agreed upon in the argument this morning—cannot in law be considered to be a renewal and a continuation of the conditions of the old obligation, or such an instrument as continues the obligations under the old bond; and the taking of testimony with relation to that, and whether or not that would be a renewal, and submitting it to the Jury, and then taking it from the Jury, would be a waste of time. I take it from the statement of counsel that it would require some time to do that, and feeling as I do with relation to it, I don't think it

would be justified. How would the Court instruct the Jury? He would say: "Here are two bonds. One bond contains such rights and such obligations. Now, here is another bond. This contains broader obligations and rights." Now, under which bond would it come? It would not come under both. If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one. I couldn't instruct the Jury under that, because it is a renewal. It is changed considerably. We proceed then on a new theory. So that I think this motion must be granted with relation to that old bond, and any recovery under the old bond, or for any sort of misconduct that were sought to be insured against in the old bond, I think will have to be disregarded, and we will have to proceed here, and determine what are the facts with relation to what was the new bond, and whatever that would culminate in, that can be recovered. But I think the other is clearly not proper to be submitted. I will frankly state to you now, while it is not here, I have very serious doubts in my mind whether or not those renewal bonds are separate and distinct obligations, and the rights of the parties to recover must be regulated with that in view, even though they are renewals, because it contains the same terms and conditions as the old contract, but it is a new con-

tract. Now, as to the statement in relation to failure on the part of the insurance company to renew this bond, and that there was an agreement on their part to keep it in force, that can't obtain here. If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action. That would not be this action—but an action upon a contract. That is upon another ground or theory, and could not be invoked here.

MR. ROBERTS: That is in reply to their pleading, which sets forth that we had wrongfully obtained this last renewal from them after the date of the expiration of the other bond.

THE COURT: Yes. Whether this last bond was wrongfully obtained when the fraud was practiced on the part of the assured—Of course, that is an issue here. That can be determined. But anything of that kind would not date back to the old bond. That is a new relation.

MR. ROBERTS: That is true under Your Honor's theory of the contract, but, of course, I think Your Honor has a wrong understanding—

THE COURT: Yes. I understand that, from your view, you think my conclusions are wrong, but there is not any other way that I can approach it from the various view points to which it presents itself to my mind. Note an exception to the conclusion of the Court.

MR. ROBERTS: This amounts, then, to a holding by the Court at this time, that upon a demurrer, or what is equivalent to a demurrer, the pleading does not state facts sufficient to justify any recovery upon any other than the last bond.

THE COURT: It would be hardly that. While this matter was before me, I think, on a motion heretofore, I denied the motion at the time with some observation that the matters could be, perhaps disposed of on the trial. After listening to the opening statement to the Jury as to what the facts in the case are, and likewise the facts as developed in the argument, and conceded by counsel, and the matters presented this morning, I am convinced beyond any question of doubt in my mind that this is the only real conclusion that can be placed upon the facts, as conceded and stated.

MR. ROBERTS: What I was trying to arrive at by my question to Your Honor was this: Some way to have the matter determined now as a question of law, so that we could determine—

MR. DOVELL: I think it is determined, Mr. Roberts.

MR. ROBERTS: Oh, no. Mr. Dovell says he thought it was determined, but the difficulty is that we have pleaded a loss which continues over under this last renewal, and it would take all the evidence, just the same, to prove the

little loss, that it would take to prove the whole case.

MR. DOVELL: No; it would not. Tell us how much that is, and we will try to figure on it.

MR. ROBERTS: It is set forth in the pleading.

THE COURT: Yes.

MR. ROBERTS: It is itemized. \$780.87.

THE COURT: I noticed the stenographers taking all the statements and all the arguments, so the whole record is before the Court.

(Whereupon, at 11:30 A. M., a recess was taken).

MR. DOVELL: The defendant agrees that judgment may run in favor of the plaintiff for 688.27, it being understood that said defendant does not, in any particular, admit or confess that the Mack A. Mitchell mentioned in the complaint has been guilty of any act of fraud or dishonesty, or forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or misappropriation, or any criminal act, and I believe counsel for the defendant is ready to—

MR. ROBERTS: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal of the old bond, and was, as a matter of fact, a continuation of the contract of insurance and the continuations by renewal from year to year from 1906, and that it was agreed

between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to year, and that the bond or instrument dated April 1, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff's complaint.

MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?

MR. ROBERTS: I have both written and oral evidence to prove that fact.

MR. DOVELL: To that we will object upon the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms.

THE COURT: I take it that this offer is now in harmony and in support of the statements made to the Jury in the opening statement as to the manner in which these matters would be established?

MR. ROBERTS: And the statements made to Your Honor this morning in open Court, and in the pleadings.

THE COURT: Yes. All right. The objection to the offer will be sustained. The offer is denied.

MR. ROBERTS: And an exception allowed.

THE COURT: Yes. Judgment will be entered in favor of the plaintiff for the amount stated. Exception allowed.

BE IT FURTHER REMEMBERED, that in due time plaintiff submits the foregoing as its proposed bill of exceptions herein, and prays that the same may be settled and allowed.

Dated this 28th day of June A. D. 1915.

JOHN W. ROBERTS and
GEORGE L. SPIRK,

Attorneys for Plaintiff.

The foregoing Bill of Exceptions is presented in due time and is true and correct, and the same may be settled and filed.

McCLURE & McCLURE,
HUGHES, McMICKEN,
DOVELL & RAMSEY,

Attorneys for Defendants.

Now, on this 12th day of July, 1915, this cause coming regularly on to be heard on the application of the plaintiff to have its proposed Bill of Exceptions settled, signed, filed and made of record in said cause, the parties hereto appearing by their respective counsel, and it appearing to the Court that the foregoing Bill of Exceptions contains all the facts upon which the said cause was tried before the undersigned Presiding Judge upon the

trial of said cause, and all the evidence and testimony offered upon the trial of said cause, and all objections made by counsel for the respective parties to the receiving or rejection of said evidence offered, and all the motions and the rulings of the Court thereon, and all exceptions taken at the time thereto, the said Bill of Exceptions has been examined and found correct, and contains all the material facts, matters and proceedings, not already a part of the record in said cause, and is hereby settled, signed and ordered filed and made a record herein, all of which is accordingly done by the undersigned, the Judge before whom the said cause was tried.

JEREMIAH NETERER,

Judge of the United States District Court for the Western District of Washington, Northern Division.

Service of the foregoing proposed Bill of Exceptions by delivery of a copy thereof to the undersigned is hereby acknowledged this 2nd day of June, A. D. 1915.

W. G. DOVELL,

Attorneys for Defendant.

Checked. Plaintiff's Proposed Bill of Exceptions was lodged with the Clerk of this Court June 29th, 1915. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 12, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

PETITION FOR WRIT OF ERROR

Now comes Miner's & Merchant's Bank, a corporation, plaintiff herein, and says:

That on the 22nd day of June, A. D. 1915, this Court entered a decree herein, in which decree and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, and of which more in detail appears from the assignment of errors which is filed with this petition.

Wherefore, the plaintiff prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States Circuit Court of Appeals.

JOHN W. ROBERTS,

GEORGE L. SPIRK,

Attorneys for Plaintiff.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk, By Ed. M. Lakin, Deputy.

ASSIGNMENT OF ERRORS

Comes now Miners & Merchants Bank, a corporation, the plaintiff herein, and assigns errors in the trial, decisions, rulings, decree and orders of said District Court in said cause, as follows:

I

The District Court of the United States for the Western District of Washington, Northern Division, erred in granting the motions made by the defendant to exclude testimony on behalf of the plaintiff, and in sustaining the motions made by the defendant to exclude all testimony except such as related to the bond of April 1, 1913.

II

Said Court erred in sustaining the motion of the defendant to exclude the testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchel, occurring prior to April 1, 1912.

III

Said Court erred in sustaining the motion of defendant to exclude all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1, 1913.

IV

Said Court erred in refusing to allow the plaintiff to offer proof to sustain the allegations of its complaint, and in refusing to allow plaintiff to

introduce evidence to establish the facts which it offered to prove.

V

Said Court erred in excluding the offer of testimony on behalf of the plaintiff to prove the allegations of its complaint, and to prove that the bond was at all times during the periods named in the complaint renewed and continued in force, and in refusing to allow plaintiff to prove that the instrument of April 1, 1913, was a continuation and renewal bond, and, by agreement between the parties, was to be and was at all times so treated and stated.

VI

Said Court erred, first, in refusing to allow the plaintiff to prove as a matter of fact, that it at all times had an agreement with the defendant surety company that the bond and contract of suretyship was to be at all times continued in force until further notice; second, in refusing to allow the plaintiff to prove as a question and matter of fact that said instrument, called the last bond, was given in pursuance of said contract, as such renewal, and that the said instrument was, as a question and matter of fact, a renewal bond, and given as a renewal bond, and was a continuation of the contract of insurance.

VII

Said Court erred in denying the offer of proof made by the plaintiff, and in failing to submit to

the jury for determination, the issues between the parties hereto, as set forth in the complaint.

VIII

Said Court erred in overruling the motion of the plaintiff for a new trial, and erred in refusing to the plaintiff a rehearing and a retrial in the cause.

IX

Said Court erred in entering the final judgment, and erred in entering judgment for the plaintiff only in the sum which the defendant surety company was willing to admit to be due; and erred in entering final judgment in favor of the defendant, against the plaintiff, and erred in not hearing the evidence, and entering the final judgment for the plaintiff for the full amount prayed for by the plaintiff in the cause.

Wherefore, the plaintiff prays that the said judgment of the said District Court of the United States for the Western District of Washington, Northern Division, be reversed.

Dated this 28th day of June, A. D. 1915.

JOHN W. ROBERTS,

GEORGE L. SPIRK,

Attorneys for Plaintiff.

Indorsed: Assignment of Errors. Filed in the District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

ORDER ALLOWING WRIT OF ERROR

On this 29th day of June, 1915, comes the plaintiff, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon plaintiff giving a bond according to law in the sum of Two hundred fifty dollars (\$250.00), which will operate as a bond for costs.

JEREMIAH NETERER, Judge.

Indorsed: Order allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915, Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

BOND ON WRIT OF ERROR

KNOW ALL MEN BY THESE PRESENTS That Miner's & Merchants Bank, a corporation, plaintiff herein, as principal, and the National Surety Company, a corporation, as surety, for and on behalf of said Miner's & Merchants Bank, are held and firmly bound unto United States Fidelity & Guaranty Company, the defendant herein, in the full sum of Two hundred and fifty (\$250.00) dollars, to be paid to the said United States Fidelity & Guaranty Company, a corporation, its attorneys, successors or assigns, to which payment well and truly to be made, we bind ourselves, our assigns, and successors, jointly and severally by these presents.

Sealed with our seal, and dated this 28th day of June in the year of our Lord, One thousand nine hundred and fifteen (1915).

Whereas in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court between Miner's & Merchants Bank, a corporation, plaintiff and United States Fidelity & Guaranty Company, a corporation, defendant, a judgment was rendered in favor of the plaintiff, Miner's & Merchants Bank, and against the defendant, United States Fidelity & Guaranty Company, as to one of its causes of action, and in favor of the defendant and against the plaintiff as to certain other of the plaintiff's causes of action, and said plaintiff having obtained from said court a Writ of Error to modify

and reverse so much of the judgment in the aforesaid suit as is in favor of the defendant and against the plaintiff, and a citation directed to said United States Fidelity & Guaranty Company, a corporation, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California.

Now, the condition of the above obligation is such that if said plaintiff, Miner's & Merchants Bank, a corporation, shall prosecute said Writ of Error to effect, and answer all damages and costs, if they shall fail to make good their plea then the above obligation to be void; otherwise, to remain in full force and effect.

MINER'S & MERCHANTS BANK,

By J. E. Chilberg, Pres.

NATIONAL SURETY COMPANY,

By Geo. W. Allen, Attorney in Fact

(SEAL)

Approved this 29th day of June, A. D. 1915.

By JEREMIAH NETERER,

District Judge.

Indorsed: Cost Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

ACCEPTANCE OF SERVICE

We the undersigned attorneys for the defendant, United States Fidelity & Guaranty Company, a corporation, do hereby admit service and receipt of copies of the Petition for Writ of Error, Assignment of Errors, Order Allowing Petition for Writ of Error, Bond on Writ of Error, Writ of Error, and Citation on Writ of Error, and do hereby waive any other or further service of said matters.

Dated at Seattle, Washington, this 29th day of June, A. D. 1915.

McCLURE & McCLURE,
HUGHES, McMICKEN,
DOVELL & RAMSEY,

Attorneys for Defendants.

Indorsed: Acceptance of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 12, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

PRAECIPE FOR TRANSCRIPT

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and certify, to constitute the transcript of record on appeal in the above entitled cause, typewritten copies of the following enumerated papers, omitting all captions, verifications, acceptances of service, and other indorsements, except file marks:

1. Complaint.
2. Answer.
3. Reply.
4. Decree.
5. Motion for New Trial.
6. Order Denying Motion for New Trial.
7. Bill of Exceptions and Order Settling Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Errors.
10. Order Allowing Writ of Error.
11. Bond on Writ of Error and Approval thereof
12. Acceptance of Service.
13. Writ of Error.
14. Citation.

JOHN W. ROBERTS,

GEO. L. SPIRK,

Attorneys for Plaintiff.

Indorsed: Praecipe for Transcript. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORDUNITED STATES OF AMERICA, WESTERN DISTRICT OF
WASHINGTON.—SS.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing ~~172~~² printed pages numbered from 1 to ~~138~~², inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return; 305 folios at 15c	\$45.75
Certificate of Clerk to transcript of record; 4 folios at 15c60
Seal to said Certificate20
Statement of cost of printing said transcript of record, collected and paid.....	142.00
Total	<hr/> \$188.55

I hereby certify that the above cost of preparing and certifying record amounting to \$188.55, has been paid to me by Messrs. John W. Roberts and George L. Spirk, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 24th day of July, 1915.

(SEAL)

FRANK L. CROSBY,

Clerk U. S. District Court.

WRIT OF ERROR

UNITED STATES OF AMERICA, NINTH JUDICIAL CIRCUIT.—SS.

The President of the United States of America to the Honorable Judges of the District Court of United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in said Circuit Court of Appeals before you, or some of you, between Miner's & Merchants Bank, a corporation, Plaintiff in Error, and United States Fidelity & Guaranty Company, a corporation, Defendant in Error, a manifest error hath happened to the great damage of said Miner's & Merchants Bank, a corporation, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said Circuit, within thirty (30) days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable E. D. White, Chief Justice of the Supreme Court of the United States of America, this 29th day of June, A. D. 1915.

Attest: FRANK L. CROSBY,

Clerk of the Circuit Court of
Appeals of the United States of
America for the Ninth Circuit.

By

Deputy.

(SEAL)

The foregoing Writ is hereby allowed.

JEREMIAH NETERER, Judge.

Indorsed: Original. No. 2750. In the United States Circuit Court of Appeals for the Ninth Circuit. Miner's & Merchants Bank, a corporation, Plaintiff in Error, vs. United States Fidelity & Guaranty Company, a corporation, Defendant in Error. WRIT OF ERROR. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

CITATION

UNITED STATES OF AMERICA.—SS.

The President of the United States, to the United States Fidelity & Guaranty Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein Miner's & Merchants Bank, a corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why so much of the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 29th day of June, A. D. 1915.

(SEAL)

JEREMIAH NETERER,

United States District Judge.

Indorsed: Original. No. 2750. In the District

Court of the United States for the Western District of Washington, Northern Division. Miner's & Merchants Bank, a corporation, Plaintiff, vs. United States Fidelity & Guaranty Company, a corporation, Defendant. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No.

2626

2

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

**UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation,**
Defendant in Error.

Brief of Plaintiff in Error

**UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.**

**JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,**

Attorneys for Plaintiff in Error.
1304 Alaska Bldg., Seattle.

METSON, DREW and MACKENZIE
of Counsel.

Filed





No. _____

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,

Attorneys for Plaintiff in Error.
1304 Alaska Bldg., Seattle.

METSON DREW and MACKENZIE,
of Counsel.

No. _____

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MINERS & MERCHANTS BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

STATEMENT.

Miners & Merchants Bank, a Washington corporation of Seattle, was at all times herein named,

operating a bank at Ketchikan, Alaska. The officers and owners were citizens and residents of Seattle.

United States Fidelity & Guaranty Company for compensation was engaged in writing fidelity bonds.

The bank was opened about May 1st, 1906, with Mack A. Mitchell as cashier. The Fidelity Company solicited the business of the bank, and as a result wrote fidelity bond guaranteeing the bank against loss on account of Mitchell, and so continued to write the bond until the time of the discovery of defalcations on the part of Mitchell.

The bank contends that the insurance was one continuing suretyship; that it was all one contract of insurance continued in force from the time of the opening of the bank until the discovery of the loss.

The Surety admits writing the bond for eight consecutive years, and the receipt of premiums for that period. It denies that the insurance was in force at the time of the discovery of the losses for two reasons:

First: It contends that each renewal or continuation of the guarantee was a new and independent contract, and discovery was not made within six months.

Second: That the last extension was obtained

through fraud of the bank.

The bank asserts:

First: That it gave this insurance to the company at its solicitation and under express agreement made by Surety as an inducement to procure the business, that it would from time to time, and before the expiration of the year, renew and continue in force this insurance. The bank to be at no pains, cost or expense from time to time, except to pay the premiums.

Second: That in pursuance of that agreement, the company did continue in force the insurance until after the discovery of loss.

Third: It denies that the last continuation was procured through misrepresentation.

The Surety before suit denied liability upon the sole ground that the acts of Mitchell did not constitute a breach of the conditions of the bond.

The cause came on for trial before a jury. The jury was duly empanelled, and counsel for each side made opening statements. Tr. pp. 65 to 75, and 75 to 86.

Thereupon counsel for Surety made the following motion:

“MR DOVELL: If the court please, I think we

can very materially abbreviate this hearing, if the court will hear two motions, which I have to present at this time. Having in mind the pleading and the opening statement of counsel, I move to exclude the testimony touching any alleged loss occasioned by any wrongful acts or conduct of Mack A. Mitchell, occurring prior to April 1st, 1912, for the reason that it appears from the complaint that no discovery of said alleged loss, or wrongful acts or conduct was made within six months from April 1st, 1912, the same being the date of the expiration of the bond and renewal, dated April 1st, 1911. And I also move to exclude any testimony touching any alleged loss occasioned by any wrongful acts, or conduct of Mack A. Mitchell occurring prior to April 1st, 1913, for the reason that it appears from the complaint that no discovery of said alleged loss or wrongful acts or conduct was made within six months from April 1st, 1913, the same being the date of expiration of the bond and renewal dated April 1st, 1912." (Tr. pp. 86, 87).

This motion was made at a time when the case was ready for the introduction of testimony but before any was offered. The Honorable Trial Court sustained the motion of counsel for the Surety, and in doing so used the following language:

"So that I think this motion must be granted with relation to that old bond, and any recovery under the old bond, or for any sort of misconduct that was sought to be insured against in the old bond, I think will have to be disregarded, and we will have to proceed here, and determine what are the facts with relation to what was the new bond, and whatever that would culminate in, that can be recovered. But I think the other is clearly not proper to be submitted. I will frankly state to

you now, while it is not here, I have very serious doubts in my mind whether or not those renewal bonds are separate and distinct obligations, and that the rights of the parties to recover must be regulated with that in view, even though they are renewals, because it contains the same terms and conditions as the old contract, but it is a new contract.” (Tr. p. 117).

Counsel for Surety then offered to allow judgment to go against it in favor of the bank for \$688.27 on account of so-called “last bond.” Whereupon, the bank, made offer to prove all the allegations of its complaint.

“MR ROBERTS: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal, and was, as a matter of fact, a continuation of the contract of insurance and one of the continuations by renewal from year to year from 1906, and that it was agreed between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to year, and that the bond or instrument dated April 1st, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff’s complaint.”

“MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?

“MR. ROBERTS: I have both written and oral evidence to prove that fact.

“MR. DOVELL: To that we will object upon

the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms.

“THE COURT: I take it that this offer is now in harmony and in support of the statements made to the jury in the opening statement as to the manner in which these matters would be established?

“MR. ROBERTS: And the statements made to Your Honor this morning in open Court, and in the pleadings.

“THE COURT: Yes. All right. The objection to the offer will be sustained. The offer is denied.

“MR. ROBERTS: And an exception allowed.

“THE COURT: Yes. Judgment will be entered in favor of the plaintiff for the amount stated. Exception allowed.” (Tr. pp. 120 to 122).

Rejected offers must be considered as proven.

Miller v. Maryland Cas. Co., 193 Fed. 347.

The Court then entered judgment against the Surety Company for \$688.27 on account of loss under the last renewal.

The bond as originally written contains the following in regard to loss: “And which shall have been committed during the continuance of said term, or of any renewal thereof and discovered during said continuance or any renewal thereof, or within six months thereafter.”

It is stated in the pleading, and admitted in opening statement, that the first discovery of loss made by the bank was on December 9th, 1913. From year to year a continuation contract was issued by the Surety. It did not write a new *bond* each year. It took no new application; no new statements or representations, but issued only the continuation as follows:

“IN CONSIDERATION OF THE SUM OF ONE HUNDRED (\$100.00) DOLLARS, THE UNITED STATES FIDELITY AND GUARANTY COMPANY hereby continues in force Bond T-450 in the sum of Twenty-five Thousand (\$25,000) Dollars, on behalf of MACK A. MITCHELL in favor of MINERS AND MERCHANTS BANK of Ketchikan, Alaska, for the period beginning the 1st day of April, 1910, and ending on the 1st day of April, 1912, subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of April, 1906.” (Tr. p. 28)

Only one was put into the record, it being admitted in the pleading that all were of the same tenor and effect, differing only in date, to April 1st, 1913. The contract was further continued in force by the instrument (Tr. pp. 29 to 31). This document bears the date to which the prior continuation carried the insurance, and *continued without any date of termination*, being a continuous contract of insurance unless terminated by notice. The discovery by the bank was not within six

months from April 1st, 1913, and the Surety asserts that its liability fully terminated on October 31st, 1913, because:

(a) The last instrument was not given as a continuation or renewal.

(b) If given as a continuation, it was procured through misrepresentation by the officers of the bank.

December 9, 1913, the bank served upon the Surety written notice. (Tr. pp. 31 to 33). This was in the nature of a preliminary notice, stating that matters had come to its attention which led it to believe that a loss had been sustained. That it was sending immediately to Ketchikan, an expert accountant, and would upon his return, place before the Surety all the facts which he obtained.

December 17th, the bank served upon the surety further written notice and demand, setting forth the nature and extent of the losses. In due course the Surety contended that the facts disclosed, did not show a loss covered by the bond in that they did not make out a case of larceny or embezzlement.

The execution and delivery of all the documents referred to stand admitted in the pleadings. The receipt of the premiums for eight consecutive years is admitted.

On the question of continuous insurance the complaint alleges:

“That the said defendant held out to the plaintiff, its officers and agents, as an inducement to be allowed, for a consideration and an annual premium to be paid by the plaintiff to the defendant, to write said fidelity bond, * * * that it would from time to time and from year to year cause said bond to be renewed, continued and extended without any additional cost, expense, trouble or annoyance to the plaintiff or its officers, except the payment of the annual premium, and would keep said bond in force and renewed, continued and extended.” (Par. IV. Tr. pp. 3, 4).

“That the said defendant, United States Fidelity & Guaranty Company, as a further inducement to this plaintiff to place the insurance of its cashier with defendant, and as a part consideration for the premium to be paid by the plaintiff to the defendant, stated and represented to this plaintiff and agreed to and with the plaintiff that the defendant was in a position to give and would give to the plaintiff at all times while said insurance or any renewal or extension thereof were in force, the very best of service and the very highest grade of insurance to be had in that line of surety and fidelity insurance, and that if there should be any changes, alterations, amendments or improvements in the form of the bonds to be written and executed to banks or bankers indemnifying or insuring such bank or bankers against loss by or through their employes, that the said defendant would at all times furnish to plaintiff such improved or changed form of bond.” (Par. V, Tr. pp. 4, 5).

“That the plaintiff, relying upon said representation, statements and agreements and at the earnest solicitation and request of defendant, United

States Fidelity & Guaranty Company, did on or about the 1st day of May, 1906, pay to the defendant, United States Fidelity & Guaranty Company, the sum of \$100, as the annual premium." (Par. VI, Tr. p. 5).

"And during the period named in said bond *and continuing in the sum of \$25,000, until said insurance should be terminated*, and did expressly agree to indemnify the plaintiff against any and all pecuniary loss that might be sustained by the bank by reason of the fraud or dishonesty of the said Mack A. Mitchell in connection with the duties of his office or position amounting to embezzlement or larceny, and which should have been committed during the continuance of said insurance or any renewal thereof." (Par. VII, Tr. pp. 6, 7).

"That prior to the expiration of said bond the same was renewed and continued in force, and extended by the defendant, United States Fidelity & Guaranty Company * * * its representatives and agents, and by reason of the original agreement and understanding under which said insurance was written and through and under which said defendant corporation, by its duly authorized representatives, agreed at all times to keep this plaintiff fully indemnified," etc. (Par. VIII, Tr. p. 7).

"That the defendant corporation continued to renew said surety and fidelity agreement from year to year and until the 1st day of April, 1914, and that plaintiff did, for each year, pay the defendant corporation in advance its annual premium, and the defendant corporation did during each year receive and accept said annual premium * * * and the said defendant surety company did at all times continue to renew its agreement of insurance and indemnity to this plaintiff as against the said Mack A. Mitchell, and any and all loss on account

of wrongful acts of said Mack A. Mitchell, and said insurance was at all times kept in full force and effect." (Par. IX, Tr. pp. 7, 8).

"That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit "C" and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursuance of the original agreement and contract indemnifying and insuring said bank as hereinabove stated and as a part of the same transaction. That said bond was and is in the sum of \$25,000, and was made for a period of one year from the 1st day of April, 1913, and is still in full force and effect. That the plaintiff paid to the defendant and the defendant received and accepted from the plaintiff as consideration for said execution, renewal and extension of said bond the sum of \$62.50, and then and thereby said insurance agreement and contract was extended and continued in full force and effect until the 1st day of April, 1914." (Par. X, Tr. pp. 8, 9).

"That as a consequence of said contract of insurance and in consideration of the payment of the said annual premiums by plaintiff to defendant, the plaintiff was, and has been and is insured and indemnified by the defendant and indemnified and insured by defendant against any and all loss or damage which the said plaintiff should, on account of said Mack A. Mitchell, sustain * * * and during the period named in said contract of insurance *and continuing in the full sum of \$25,000*, and until the termination of said insurance, which is still in force and has since April 1st, 1906, been insured against all wrongful acts," etc. (Par. XI, Tr. pp. 9, 10).

“But the plaintiff at all times relied solely and wholly upon the promise and representations of the defendant and its duly authorized agents, and at all times depended solely upon the assurance of defendant and its representatives that plaintiff was fully insured against any loss, harm or damage on account of any of said wrongful acts of the said Mack A. Mitchell and left the matter of the continuation and renewal of said insurance and of giving the plaintiff at all times the best insurance to be had entirely to the defendant and its representatives and agents.” (Par. XVII, Tr. pp. 14, 15).

“That during all of the period hereinabove named the defendant charged the plaintiff for said contract of insurance on account of the said Mack A. Mitchell, the highest premium charged or collected by any other surety or fidelity company doing business within the State of Washington or the Territory of Alaska, and did during all of the eight consecutive years charge and collect from this plaintiff the full premium charged by any and all of the most substantial and responsible insurance companies doing business within the territory or state named, and did at all times charge this plaintiff and collect and receive from this plaintiff during said entire period the premium charged for the best, most modern and up-to-date insurance of that character to be had from any surety company, which premium was at all times paid by plaintiff upon and under the agreement and understanding that it was receiving at the hands of defendant at all times the most modern and up-to-date policy and insurance of that kind or character to be procured.” (Par. XVIII, Tr. p. 15).

“That the plaintiff bank has at all times since it entered into the contract of insurance with the defendant fully complied with all the terms, condi-

tions and provisions of said contract of insurance, and has fully kept and performed all the terms conditions and provisions of said contract of insurance by it to be kept and performed. That it has fully and promptly paid all premiums, and since the discovery of said wrongful acts and conduct on the part of said Mack A. Mitchell, has fully complied with all the terms and conditions of said contract of insurance on its part to be kept and performed." (Par. XXI, Tr. p. 17).

The continuations were by allegations, made a part of the complaint, and are admitted by the answer. A copy of one of them has been copied into this brief and is found on page 28 of Transcript.

The bond is likewise, made a part of the complaint, and contains the following:

"It is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer," etc. (Tr. p. 21).

"NOW, THEREFORE, THIS BOND WITNESSETH, That for the consideration of the premises, the Company shall, during the term above mentioned, *or any subsequent renewal of such term.*" (Tr. p. 22).

"*And which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employe from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account*

of said Employee under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS." (Tr. p.22)

"It being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, *unless otherwise stipulated between the Employer and the Company.*" (Tr. p. 26).

We claim it was "otherwise stipulated" between bank and surety.

The notices served on the bank were made exhibits to the complaint and a part thereof.

In Exhibit "D" the following allegation was made:

"Your bond was in the amount of Twenty-five Thousand Dollars (\$25,000), and has been renewed each succeeding year, including the year 1913, the bond for the year 1913 bearing date of April 1st, 1913, your bond having been continuously in force in the same amount since the said 1st day of May, 1906." (Tr. p. 31).

The Surety, by answer, put in issue the facts alleged as to the loss, and the nature and character thereof and the allegations as to the contract for continuation and extension, and denied generally liability.

It pleaded affirmatively:

First: That no breach of the bond was dis-

covered until December 9th, which was more than six months after April 1st, 1913.

Second: That the continuation of April 1st, 1913, had been procured from the company by misrepresentations on the part of the plaintiff bank in that the officers of the bank had knowledge of the wrong doing of Mitchell at the time said contract was executed; that they having discovered Mitchell's defaults, had, in November, gone to the Surety and by concealing the knowledge which they had, induced the Surety to execute the continuation as of April 1st, 1913, so as to avoid the six months forfeiture clause.

Third: That the bank had agreed at the time of the issuance of the bond, and at the time of the various extensions thereof, and as a condition of the issuance of said bond and the various continuations thereof, that the bank would from time to time make new and proper examination of the books and accounts of Mitchell, and that the bank had wrongfully failed and neglected to make these examinations from time to time. That the bank was therefore estopped to recover because of said breaches of warranty.

Bank in its reply denied generally the affirmative matters, and denied that it had procured the last renewal and continuation to be executed as of

date of April 1st, 1913, through fraud or misrepresentation, and made in reply the following allegation:

“That said bond marked Exhibit “C” and attached to the complaint of plaintiff was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance to plaintiff, as, for and on account of the said Mack A. Mitchell, as cashier of plaintiff bank, and was and is a continuation of said fidelity insurance and contract. That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, as fully set forth in the complaint herein, and for the consideration of the premiums paid and without any further or additional application having been made therefor.” (Tr. pp. 53, 54).

Bank in its reply admitted that there was a delay on the part of the Surety in renewing the bond, but alleged that the delay was caused by the Surety itself, and was through its own neglect. That upon the delay being called to the attention of the Surety it admitted that the delay was its own fault and neglect, and immediately recognized and admitted that it had agreed to continue said insurance, and did thereupon immediately continue same by the renewal as of date of April 1st, 1913. Bank further alleged that the Surety did at the proper

time for the renewal, forward same to Mitchell at Ketchikan, and that Mitchell returned it to the Surety saying that he did not care for further continuance. That Mitchell at all times concealed this fact from the bank. That the bank, without any knowledge that the Surety had taken the matter up with Mitchell instead of with the bank, at all times believed the bond had been renewed and relied wholly upon the fact that the Surety had agreed to keep the insurance renewed, and had no knowledge that it had not been renewed. The bank denied that it had breached any warranty, and denied that it had ever executed any application or had made any statement subsequent to May, 1906. (Tr. pp. 54 to 58).

Counsel for bank, in opening statement to jury, stated:

“This bond was renewed from year to year. We allege, and expect the evidence to show to you, that the arrangement and agreement was made at the time the bond was written, that the agents of the surety company should, from year to year renew the bond. The company did renew the bond from year to year, each time renewing it before the expiration of the year, *and that the bond continued in force until after the occurrences for which the action is brought.*” (Tr. p. 67).

“The bond was first written in 1906, and renewed each successive year, including the year 1913, and until April 1st, 1914, and the premium paid

to the company by the bank. The bank paid that premium, not Mr. Mitchell. The bank procured the bond itself, and paid the premium." (Tr. p. 74).

Counsel for Surety, in his opening to the jury stated:

"They sent him up there, and armed him with full authority to conduct the business of that bank at Ketchikan, and during all the time he was there, from 1906 until 1913, made, I believe, but one examination of his accounts, and that was in the early part of his regime there. Such was the trust and confidence they had in him. In 1906 the defendant surety company was represented in Seattle by Calhoun, Denny & Ewing." (Tr. p. 76).

(The authority, therefore, of Calhoun, Denny & Ewing stands admitted in the record).

"Some short time before 1913 we changed our agent here, and the new agent, a Mr. McCollister, left the Alaska Building and took up his quarters in the Hoge Building." (Tr. p. 78).

"We followed the usual custom as we do with all bonds—our agents sent them the usual notice that their bond was about to expire." (Tr. p. 78).

"The notice was received, of course, by Mr. Mack Mitchell himself, who was the only one in the bank at Ketchikan. He, thereupon, notified us that they did not desire a renewal of the bond." (Tr. pp. 78, 79).

"Then in November some time they come to us and say, 'How is it that that bond was not issued in April? We wanted that bond.' Of course they

had not paid any premium for any bond, but they said, 'We want that bond, and will you kindly write it, and date it back to April 1st?' " (Tr. p. 80).

Counsel for Surety in his argument, stated:

"Your Honor will not fail to understand why they sought to get this last bond; *they thought it would operate as a renewal of the old bond.*" (Tr. p. 92).

Counsel for bank in his argument to the court, stated:

"While counsel has not fully stated it, he has probably understood our contention, in that we contend this is one continuous insurance." (Tr. p. 99).

"We expect to show that it was the arrangement between these parties that this should be renewed—that the company would keep it renewed, and that it did keep it renewed, and that counsel is mistaken when he says that we would apply each year for that renewal." (Tr. p. 100).

"Then, we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this company, and asked them—called their attention to it, and they then agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way we got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of

all the companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally. Now, so much for those questions, all of which are questions of fact for the jury.” (Tr. pp. 100, 101).

“Because of the fact that it was in pursuance of the original arrangement and agreement, which existed between us, and because of the fact that that is what we asked them to do, and because as and for a renewal, that is the bond which they gave us.” (Tr. p. 105).

“Now, if that were not a renewal, what explanation can be offered for the dating of it back? If that were a new contract—a new bond—it would have to have been dated on the date it was executed.” (Tr. p. 106).

“They had done all the business here; they had been paid all the premiums here; for eight years, they collected these premiums. They had collected these premiums for eight years. They had done all the business here. They, themselves, renewed the bond from year to year without any action on the part of the bank. The bank had relied upon them from year to year. And, as I said, had not the agency been changed, this difficulty would never have arisen.” (Tr. pp. 109, 110).

“And then, when the bank discovered it, which, as I said, was discovered through the old agency, and not on its own account, they asked for a renewal of that bond, and they are given this other

bond. * * * And they gave that bond, then, as a renewal or a continuation of this contract of insurance.” (Tr. p. 110).

“The bond they gave to us as a renewal was the bond they were giving then to all persons—the bond they were giving to any one who made application for like insurance. I can see no difference, if the Court please, whether they had given us one of these certificates, or whether they gave us, in lieu thereof, the other paper, which is now referred to as the new bond. We want the privilege of showing that they agreed to give it to us as a renewal and that they did give it to us, as a matter of fact, as a renewal, and we want to submit that question of fact to the jury; first, that they agreed to give it to us as a renewal; second, that they did give it to us as a renewal of this insurance, and as a continuation of the insurance which we had had, and carried, and paid them for, for eight consecutive years.” (Tr. pp. 110, 111).

“But certainly, certainly, if we can prove that they agreed to renew this old contract, and that they did renew this old contract, the form of the renewal is immaterial.” (Tr. p. 115).

“So, as I said, I think it would certainly not be advisable for the Court to undertake at this time to say in advance of the offering of any testimony that we would not be permitted to offer any testimony in relation to the renewal of this contract.” (Tr. p. 115).

Counsel for bank then made offer to prove all its allegations, and to prove as a fact that the Surety had agreed to continue the bond, and that it was so continued. (Tr. pp. 120, 121).

The decree entered by the Honorable Trial Court contained the following:

“THEREUPON, Counsel for the plaintiff asked permission to be allowed to prove and made offer to prove the fact, that the bond of April 1st, 1913, was a renewal bond and given in pursuance of previous arrangement and agreement for the continuation of the insurance and as a renewal and continuation of the former bond, and to prove the allegations of its complaint.” (Tr. p. 61).

Motion for new trial was filed, duly heard, and overruled, and exception allowed. (Tr. pp. 62 and 64).

No evidence of any kind was received by the Honorable Trial Court. No admissions of counsel were made, except as have been hereinabove copied. The Trial Court refused to hear any testimony and decided the whole cause as a matter of law.

All statements made by counsel either to the jury or to the Court, except arguments upon law, have been made a part of the record.

SPECIFICATION OF ERRORS.

The Honorable Trial Court erred:

1st. In granting the motion made by Surety to exclude all testimony on behalf of bank, except as it related to loss under the instrument of April 1st, 1913.

2nd. In excluding all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mitchell occurring prior to April 1st, 1913, or April 1st, 1912.

3rd. In refusing to allow bank to offer proof to sustain the allegations of its pleadings, and in refusing to allow bank to introduce evidence to establish the facts which it offered to prove.

4th. In refusing the offer of testimony on behalf of bank to prove the allegations of its complaint, and that the bond was at all times during the periods named, as a fact, renewed and continued in force, and in refusing to allow bank to prove that it was agreed that the instrument of April 1st, 1913, was a continuation and renewal of the bond, and that it was, by agreement between the parties, to be and was at all times a continuation of the surety contract, and was so understood and treated.

5th. In refusing to allow bank to prove as a matter of fact that it had an agreement with the defendant Surety that the bond and contract of suretyship was to be by the Surety continued in force, and that it was to be from time to time within the year renewed, and in refusing to allow bank to prove as a question and matter of fact that said instrument, called by the Surety, the last bond, was given in pursuance of said contract.

6th. In overruling motion of bank for new trial, and in refusing the bank a rehearing and retrial in the cause.

7th. In refusing and denying to bank a trial of the issues of fact raised by the pleadings.

8th. In entering final judgment in the cause, and in entering judgment for the bank only in the sum which the Surety was willing to admit on account of the so-called last bond, and erred in entering final judgment in favor of the defendant against the plaintiff, and erred in not hearing the evidence and entering the final judgment for the bank for the full amount prayed.

ARGUMENT.

“The object of an indemnity bond is to indemnify, and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as actual security and misleading as a pretended one.”

Bank of Tarboro v. Fidelity etc. Co., 83 Am. St. Rep. 682.

“Courts have always set their faces against an insurance company which having received its premiums, has sought by technical defense to avoid payment.”

Mutual Life Ins. Co. v. Hill, 193 U. S. 551.

In the statement we have quoted copiously from the pleadings and statements of counsel, be-

cause the decision was based wholly thereon.

We assume that no statement of counsel may properly be considered, except in so far as same is an admission.

Counsel for Surety stated that Mr. Ed Chilberg was the head of the bank and that certain things took place with him. (Tr. pp. 79, 80).

Counsel for the bank stated that Mr. Ed Chilberg was not an officer of the bank, nor a Trustee, nor connected in any way with it or its management until November 29th, 1913. (Tr. p. 66).

Such statements present only issues of fact.

CONTINUATION OF SURETYSHIP.

The bond expressly provides for renewals. It says: "such promises and any subsequent representation." That the company "shall, during the term above mentioned, or any subsequent renewal of such term." "Which shall have been committed during the continuance of said term, or of any renewal thereof and discovered during said continuance or of any renewal thereof, or within six months thereafter." That the liability on account of the bond "or any renewal thereof," was not to exceed \$25,000. (Tr. pp. 21, 22).

Then, from year to year, in consideration of

the premium, it executed an instrument which, "*hereby continues in force*" the bond.

We desire to call the attention of the court upon the threshold of this argument, to the fact that in none of the cases cited by counsel below, and upon which the Trial Court must have relied, does the renewal certificate contain the words: "*hereby continues in force.*" The continuation certificate which Your Honors must here consider, is different from any found in the earlier cases, and as stated by one of the courts of last resort, was undoubtedly put out to meet the objections of the earlier cases, and to be a certificate which does constitute a continuance of the insurance contract.

U. S. Fid. & Guar. Co. v. Citizens Nat'l. Bank of Monticello, 143 S. W. 997.

U. S. Fid. & Guar. Co. v. Shepherds Home Lodge, 174 S. W. 487.

First National Bank v. U. S. Fid. & Guar. Co., 110 Ten. 10, 100 Am. St. Rep. 765.

U. S. Fid. & Guar. Co. v. First Nat'l Bank of Dundee, 233 Ill. 475, 84 N. E. Rep. 670.

Alex Campbell Milk Co. v. U. S. Fid. & Guar. Co., 146 N. Y. Sup. 92.

North St. Louis Bldg & Loan Asso. v. Obert, et al, 169 Mo. 507, 69 S. W. 1044.

Am. Credit Indemnity Co. v. Athens Woolen Mills, C. C. A., 92 Fed. 581.

Am. Credit Indemnity Co. v. Champion, C. C. A. 6th Circuit, 103 Fed. 609.

Fid. Cas. Co. v. Fechheimer, 220 Fed. 401.

The cases cited by counsel, except one, appear to be based upon and to follow the case of *De Jernette v. Fidelity Casualty Co.*, 33 S. W. 828. That case has been twice overruled, and disapproved in two subsequent decisions in the same court. Furthermore, the court in 143 S. W. says, that the provisions of the bond of the U. S. Fid. & Guar. Co. are different from the provisions of the bond of the Fid. & Casualty Co. which was construed in the *De Jernette* case.

We quote from *U. S. Fid. & Guar. Co. v. Bank of Monticello*, 143 S. W. 997:

“Appellant contends that the bond executed March 15, 1904, and each continuation certificate executed annually thereafter, to March 15, 1908, constituted separate and independent contracts, and that therefore the bank must allege and prove the loss occurring under each of them, and that the rights of the parties should be determined as to rules of notice and time of action in accordance with this theory. If this contention is correct, then appellee could not recover for any embezzlement or larceny committed by the cashier, except those committed during the life of the last contract, as the time given, to-wit, six months, for the discovery of the fraud, had expired on all the contracts but the last. Appellee, on the other hand, contends that the original bond and the four certificates constitute one continuous contract, and the lower court so held and rendered a judgment against appellant for \$15,000 only, as that was the full amount of the indemnity under the contract. Appellant refers to the case of *De Jernette v. Fid. & Casualty Co.*, 98 Ky. 558, 33 S. W. 828, 17 Ky.

Law Rep. 1088. *This court did hold that the bond and renewals in that case were separate contracts; but upon a close examination of the facts of that case and those in the case at bar, a difference will be found.* It is reasonable to presume that, because of the construction placed upon the contract in the *De Jernette Case*, that portion of the public wanting indemnity insurance required a different contract, as it seldom occurs that embezzlement or larceny is detected within three, six or twelve months after committed, especially if the employe has been in the service of his employer for some time and is trusted by him and is shrewd. Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them.

“As stated, the bond in question was issued March 15th, 1904, and the bank paid the premium, \$45., at that time. Appellant agreed in the bond to indemnify the bank in the sum of \$15,000 against any loss it might sustain at the hands of its cashier by any acts of his which amounted to embezzlement or larceny, for the term of twelve months, provided his wrongdoing was discovered within six months from the time the contract expired. If the bond and four renewal certificates contained only these stipulations, then appellant's contention is correct, and the case would be governed by the *De Jernette Case*; but we are of the opinion that the facts of this case show that the parties intended that the bond and four continuation certificates should constitute one continuous contract. In the original bond this language is used: ‘The company shall, during the term above mentioned or any subsequent renewal of such term, * * * make good and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employe in connection with the duties of his office or position, amounting to embezzlement or larceny, and

which shall have been committed during the continuance of said term or any renewal thereof, and discovered during said continuance or any renewal thereof or within six months thereafter.' Similar language is used throughout the bond, and we are unable to understand why. If the bond was intended by the parties to have no connection with any other, why was this language used? For what was it inserted? It appears from this language that appellant was obligating itself in the sum of \$15,000 to pay the bank for any embezzlement or larceny committed by its cashier, not only from March 15, 1904, to March 15, 1905, but to any period that might be fixed by any renewal of the contract." 143 S. W. 998.

Statement in the syllabus is as follows:

"HELD, that the original bond and certificates of renewal constituted but one contract, and the bank could recover for any loss sustained during the period of the bond and renewal certificates, *and discovered within six months after the expiration of the last certificate.*" Syllabus, 143 S. W. 997.

This case also holds that the question of whether or not the bank had acted with due diligence and promptness in making examinations, etc., was one for the jury. It likewise contains a discussion of what constitutes larceny and embezzlement as used in such bonds, and it is held that to conceal overdrafts is such fraud or dishonesty as amounts to larceny or embezzlement.

This case likewise contains the following statement:

“At the time appellant issued this insurance, it knew that the bank was what is called ‘a country bank,’ and that the officers of it were men who, probably, could not give the accounts an expert examination, and it is presumed that it understood the answer to the question to mean that they would give the accounts the best examination they could.” 143 S. W. 999.

United States Fidelity & Guaranty Company v. Shepherd's Home Lodge No. 2, 174 S. W. 487, also same company and same bond, except as to time.

“During the continuance of said term or of any renewal thereof, or discovery during the said continuance or within *three* months thereafter.”

The statement of the law in the syllabus is as follows:

“The contract was a continuing one, and the recovery of the lodge upon the bond was not limited to the loss occurring after the last renewal, but included the total loss from the inception of the contract up to the limit of the guaranty.”

The provisions of the bond seem to be identical with the one at bar except that three months was inserted for six.

“We are unable to distinguish this case from the *Monticello Bank Case*, for we cannot understand the meaning of the language used, or why it was used, if it was not intended to make each bond a continuation of the one preceding, and altogether constitute one contract affording indemnity in the sum named.” 174 S. W. 489.

It is significant to note that in this case there

were no renewal certificates issued, but a new bond was executed from year to year. And yet, it was held that the contract was continuing.

“While it is true, in the present case, at the end of each year, a new bond was issued instead of a renewal receipt, but each bond was in identical terms, and the last two bore the same serial number, and by them the guaranty company obligated itself to reimburse for any loss occurring ‘during the term above mentioned (the annual period) *or any subsequent renewal of such term.*’ The obligation is repeated in the bond as follows: ‘During the continuance of said term, or of any renewal thereof, and discovery during the said continuance, or within three months thereafter.’” 174 S. W. 489.

This case likewise holds that the question of the conduct of the officers of the Lodge—whether or not the statements they had made were correct statements—whether or not they had used due care in making an examination, etc.,—were all questions for the jury.

“Whether the lodge made truthful statements in the certificates for renewal, and whether ordinary care was used to know whether the statements were true, were questions for the jury.” 174 S. W. 489.

First National Bank v. U. S. Fidelity & Guaranty Co., 110 Tenn. 10, 100 Am. St. Rep. 765. Again same company and same bond. The question at issue was whether or not the amount was cumulative under the renewal, or whether it was limited to the

one penalty of \$7,000. The Court, among other things, said:

“Now it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, *it extends the indemnity provided by the old contract to a new period of time.* * * * *The parties themselves understood there was only one bond and one penalty.* (Here reference is made to a letter written by the cashier of the bank). This letter, the record shows, was dictated by the counsel for the bank and shows how the contract was understood and interpreted by the bank, before this litigation arose. The officers of defendant company and the officers of other similar companies so understood it.” 100 Am. St. Rep. 774.

We pleaded an express agreement, and alleged that both the Surety and the bank so understood it.

In *Alex Campbell Milk Co. v. U. S. Fid. & Cas. Co.*, 416 N. Y. Sup. 92, the Court held under a bond of this company, it was liable to cumulative amount; that is to say, there was a bond and three renewal certificates, and the court held that the company was liable for \$7,500 if that much had been lost during the three year period, although the bond penalty was but \$2,500.

But in our case, although the bank lost more than \$50,000, we claim the right to collect but the one bond penalty of \$25,000.

“In determining whether a guarantee is continuing or not, it should of course be read in the

light of the contract it is intended to secure, *and with regard to the situation of the parties at the time it was entered into, which may be shown by parol.*”

Spencer on Suretyship, Sec. 97.

See Frost on the Law of Guaranty Ins. 2nd Ed. pp. 99 to 104.

We quote from *North St. Louis Building & Loan Ass'n. v. Obert, et al.*, 169 Mo. 507, 69 S. W. 1046:

“But if it appears from all the circumstances that the intention of the parties to the contract was that the bond, being unrestricted by its own terms, should cover the acts of the principal during his continuance in the office, whether by re-elections or holding over, we cannot give it the restricted construction.”

The case of *United States Fidelity & Guaranty Co. v. First National Bank of Dundee*, 233 Ill. 475, 84 N. E. Rep. 670, suit against the same Surety. The contentions made in the case were that certain renewal certificates had been procured through fraud, same as here.

“Appellant contends that the two certificates made by the bank to obtain a renewal contain false representations which render the certificates void, and that therefore the bond was not in force except for the first year. The charge of false representations raises an issue of fact. The burden of proof upon that issue is upon appellant, (the Surety company).” 84 N. E. 672.

“Appellant’s contention is that the statement that the books and accounts of Wright had been examined was not true; that if an examination had been made the embezzlements of the cashier would have been discovered, and that the fact that they were not discovered is proof that no examinations were made.” Ibid 672.

“Appellant insists that the failure of the bank to discover this discrepancy is conclusive proof that no examination was, in fact, made. This conclusion is not warranted by the facts and circumstances in this record. If it be assumed that an examination of the bank’s books means only such a thorough and exhaustive examination as would necessarily discover the slightest irregularity that might exist, however cunningly covered up, then, of course, appellant’s contention would be sound; but this is manifestly not the meaning of the word ‘examination’ in the certificates in controversy. If bank officers are to be held to such a rigid method of examination and supervision over the accounts of their employes *there would be but little necessity if any for purchasing fidelity insurance*. When a trusted employe conceives a scheme of criminal misappropriation of his employer’s money, he at the same time matures his plans for covering up his wrongdoings. He has many advantages over his employer, since he knows what the real facts are, and is therefore always on his guard to allay suspicion, while the employer is ignorant of the real facts and therefore unsuspecting.” Ibid 673.

“It is no doubt probably true that an expert accountant, in making a thorough and detailed examination into the affairs of this bank, might have discovered the irregularity of June 6th, 1901; but the officers of this bank were not required by any clause in the contract to make any such examination as above supposed.” Ibid 674.

So in the case at bar, there is no requirement in the contract of insurance which requires an examination of any kind.

It was likewise contended in the above case that each renewal certificate constituted a separate and independent contract of insurance, just as is being contended here. We quote from the decision, at page 674:

“If the renewal certificate of 1902 is binding upon appellant and had the effect of continuing the bond in force for that year, then appellant is liable for the full amount of the decree below, since it is admitted that Wright’s embezzlements during the year 1902 were largely in excess of the face of the bond. If appellant’s contention as to the construction of the certificates be sustained, the result would be that the making of such a certificate would be an acquittance and release of the insurance company of all liability that existed on account of the infidelity of the employe prior to the date of the certificate.” Ibid 674.

Still another question was discussed because the assured claimed the right to treat the renewals as cumulative and to recover \$20,000, whereas the bond was for \$10,000, and the court discusses this question and holds that there was one contract of insurance and that the renewal merely continued that contract in force for the time covered by the renewal certificates, and that therefore the recovery should be for the full amount of the bond penalty, but not cumulative.

Counsel for Surety, in the court below, cited the following:

Florida Cent. etc. v. American Surety, 99 Fed. 674.

Proctor Coal Co. v. U. S. Fid. & Guar. Co., 124 Fed. 424.

U. S. Fid. & Guar. Co. v. Williams, 49 Southern 742.

We submit that *Florida* decision by District Judge Shipman, has no application. The Surety was different. The bond was different. The conditions were different. It was what is known as a "schedule bond." An entirely different form of contract. At the opening of the opinion it says: "a bond of indemnity against loss through the defalcation of its employes *who were to be named.*" Later, what was called a "schedule register" was furnished, and this register was changed from year to year as the employes changed. It was a sort of blanket policy covering all employes, but names were to be furnished. *There was in the case no question of renewal certificates continuing the original bond in force.* On the contrary, the court says, at page 675:

"The surety company had *annually*, while it was insuring the plaintiff, issued to it a *new bond* of indemnity."

On the next page it says that the assured *each*

year made out a new schedule register of employes. Thus the risk was different each year. Page 677, the court says:

“It is also plain that the contract was blindly and clumsily drawn, but, so far as it relates to the circumstances of this case, we think it is capable of being understood. *The bond states no time of its duration, and gives the name of no person for whose conduct there is to be an indemnity.* To make the contract intelligible it must be read in connection with the schedule register and the notices of acceptance, and from them it appears that *annually a new list of employes was entered on the schedule.*”

Then the court goes on to say that some of the names of the preceding list had disappeared, new names taking their places, and that the annual premium had been paid for those only whose names appeared upon the schedule.

Again the court says:

“*The course of business between the parties, as well as the bond itself, shows that there is to be an annual designation of employes upon the schedule, and an annual selection and acceptance of the names by the surety company.*” Ibid p. 677.

Page 678, the court says:

“For the period specified in the contract of insurance reference must be had to the *two other papers which*, with the bond, form the contract, and which indicate very plainly that the liability is confined to losses in the current year. This

construction is furthermore shown in the rider attached to the bond in suit."

Then the court says that the "rider" proves that insurance was limited to one year. So that in reality there were four papers to be examined in that case in order to determine what the contract really was.

Here the insurance was a direct guarantee upon the one man, Mitchell, in the one position, and continuation certificates were issued from year to year, which recited that the bond was *continued in force*. The certificate expressly "continues in force" the original bond. No such certificate issued in the *Florida case*, and the company was undertaking to insure a certain set of employes for one year, and a new and different set for the subsequent year. In other words, the risk was changing every year because of the change in the schedule of employes, and there were reasons why the insurance was expressly limited to the year.

Neither does the bond contain the provision for renewal as does the bond here. It was a straight guarantee for one year with no mention of renewal.

Proctor Coal Company v. U. S. Fid. & Guar. Co., is a case decided in 1903. There is a very material difference in the renewal certificates. In

the *Proctor case* the certificate is set forth on page 428, and provides:

“In consideration of the sum of \$25, United States Fidelity & Guaranty Co. *hereby guarantees the fidelity* of C. H. Stanton in the sum of \$5,000,” etc.

The renewal certificate in this case (Tr. p. 28) reads as follows:

“In consideration of the sum of \$100 the United States Fidelity & Guaranty Company *hereby continues in force* Bond No. T-450 in the sum of \$25,000.”

In the former there is no word about continuation; not even the word “renewal” is used, nor does it refer to any former bond. It appears to be a distinct and independent guarantee. While here the so-called renewal certificate is a certificate of continuation, continuing in force the bond as originally written.

The case was decided upon the question of whether or not an amendment should be permitted, and while the court does discuss the question of the continuation, that was not the real question before the court for decision. Near the close is this language:

“In my opinion the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover

within six months after the expiration of the original bond or any renewal the dishonest acts of the employe, and to claim indemnity for the same."

The decision is by District Judge, upon an entirely different state of facts and renewal agreement.

Furthermore, the bond in the *Proctor case* did not contain the provision for renewals and continuation which are in the later bonds.

The *Williams case* in 49 Southern 742 appears more nearly in point, but it is based upon *De Jernette v. Fid. & Casualty Co.*, 33 S. W. 828, which it follows. That case was decided on an entirely different state of facts and different bond, and the same court (as we have shown supra) which rendered that decision has in two late cases refused to follow it, and pointed out the difference in the later bonds.

U. S. Fid. & Guar. Co. v. Bank of Monticello, 143 S. W. 997, is a late case upon the bond of this same company and the same form of bond at issue here. The Court says:

"Appellant refers to the case of *De Jernette v. Fidelity & Casualty Co.*, 98 Ky. 558, 33 S. W. 828, 17 Ky. Law Rep. 1088. This court did hold that the bond and renewals in that case were separate contracts; but upon a close examination of the facts of that case and those in the case at bar, a difference will be found."

Then, after examining and pointing out the difference in the two contracts, the Court says:

“Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them.”

The *De Jernette case* is cited in all three authorities relied on by counsel, and in all three, the early forms of bond were construed, and the later form of bond was unquestionably demanded by employers because of the earlier cases, and to meet those decisions. The later form, which is in question in this case, was put forth by the company, and the later decisions which we cite, all hold that it is one continuous contract of insurance.

In discussing these differences, the Kentucky Court of Appeals says further:

“But we are of the opinion that the facts of this case show that the parties intended that the bond and four continuation certificates should constitute one continuous contract. In the original bond this language is used: ‘The company shall, during the term above mentioned or any subsequent renewal of such term,’ ”

That language is the exact language found in the bond here, but was not in the bonds in the earlier cases.

The case of *American Credit Indemnity Co. v. Champion*, 103 Fed. 609, is a decision of the Circuit Court of Appeals of the 6th Circuit. The

opinion is by Mr. Justice Lurton. The case is not parallel but by analogy in point.

The question was whether or not a certain renewal bond continued the original bond in force, and it was held that it did so. We quote from the opinion, the following:

“Both claims were, therefore, barred, unless they are saved by the eighth condition of the bond. That condition is in these words:

‘In case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss on sales covered according to the terms, conditions and limitations hereof, resulting after said date of expiration upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, covered losses occurring during the term of this bond on shipments made during the term of the said preceding bond may be proven hereunder, subject also to the terms, conditions, and limitations of said preceding bond.’

“Both the first and second bonds contain this precise condition, and the terms, conditions and limitations of each are identical, save in respect to the initial loss and single debtor limitation. *The clear purpose and intent of this provision was to carry forward and indemnify the insured against losses which might result from sales and shipments during the period of the first bond, but which would not be provable, under the prescribed terms of the bond, within the period of its life. This extension of the time during which losses might be probable is made dependent upon the issuance of a*

renewal policy. The purpose of the renewed policy was twofold: First, it was a guaranty against loss upon sales and shipments made during its period; and second, *it secured or extended the guaranty* of the preceding bond to losses upon sales during its period which did not technically become provable during its term." 103 Fed. 611.

This is in line with our contention that the renewals which expressly recite that they continue in force the bond extended the guarantee of the preceding bond to losses during its period and throughout the period of the succeeding continuations.

"This is the most reasonable interpretation, and accords most nearly with the justice of the matter. In the case of *American Credit Indemnity Co. v. Athens Woolen Mills*, a cause decided by this court, and reported in 34 C. C. A. 161, and 92 Fed. 581, we found a difficulty of the same general character arising out of a doubt as to whether the definition of insolvency found in a renewal policy applied to a loss which was provable under the renewal bond, though it arose from sales made during the currency of the preceding bond. The condition by which the renewal bond was made to apply to losses originating under the preceding bond was not in all respects identical with that involved here, though substantially the same. Referring to the promissory clause of the preceding bond, we said:

'We are to consider that by that clause it was clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses thereon did not accrue during its life; *and we ought not to defeat that intention and just expectation of the assured, unless the words*

of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of the clause 8 of bond No. 2443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond and during its life; while clauses No. 8 and 11 of bond No. 1540 shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond.'

"In the same case we held bonds of this character to be essentially insurance contracts, and that doubtful and ambiguous expressions were to be construed most favorably to the insured." 103 Fed. 613, 614.

American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 851. Decision by Judge Taft. It was held that the "renewal bond" carried forward the liability in the original bond, and that in determining the right of recovery the two must be construed together.

Fidelity Casualty Co. v. Fechheimer, 220 Fed. at page 401, is a recent decision by the Circuit Court of Appeals of Sixth Circuit. It is a case of much the same character as the two preceding. The second bond contained different terms and conditions from the first. One of the very points being made by counsel in the case at bar. At page 411 the Court says:

"The kind of losses on shipments made during the period of the second bond recoverable there-

under, differed materially from the kind of losses recoverable under the conditions of the first bond."

At page 413 is quoted from the decision of Judge Taft, the following:

"These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorable to the insured. * * * We ought not to defeat the intention and just expectation of the assured, unless the words of the renewal bond necessarily require it."

It was held that notwithstanding the provisions and conditions of the second bond were different, it was nevertheless a continuation of the first.

In *North Street Bldg. & Loan v. Obert*, 169 Mo. 507, 69 S. W. 1044, the court in discussing the question of continuation of a liability by renewal, said:

"When it becomes a matter of construction, it is the duty of the court to put itself in an attitude to view the contract from the same standpoint that it was seen by the parties when they entered into it."

We now wish to emphasize another clause of the bond under consideration which seems decisive.

"The Company's total liability on account of said Employee under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS." (Tr. p. 22).

Why was this clause inserted if the bond was not meant to be a continuing obligation? If these contracts are as now contended, separate, distinct and independent contracts, then the liability could not exceed Twenty-five Thousand Dollars. That a bond may not be held for any sum beyond its penalty is axiomatic. The fact that it says, "under this bond *or any renewal* thereof" the liability shall not exceed \$25,000, establishes the fact that the company wrote this as a continuing bond, and with the intention that it should continue in force from year to year but limited to \$25,000 loss. Otherwise, that language is not only superfluous but utterly meaningless, because in no event could any one bond limited to one year be held for a sum to exceed \$25,000. The clear meaning is that the bond is to continue but the penalty not cumulate.

This is the fourth time and the fourth place in which the bond uses the term "renewal." What is the meaning and force of the word "renewal" so often used in this bond? Under the interpretation sought by counsel, it would mean nothing. If the contracts were to be independent annual contracts, they would be made as they came along and without inter-dependence. There would be no occasion whatever to stipulate for renewals as has been done in this bond, *nor to limit recovery to*

one bond penalty.

In pursuance of these stipulations and the agreement made with the Surety, it did without any further contract, without further application, without further written statements or representations, continue this bond—continue the suretyship, and the fact that one instrument in the chain is somewhat different in terms is wholly immaterial. It continued the insurance consecutively as to date. It was made under the same circumstances and conditions, for the same amount, for the same bank, on the same risk, and for premiums paid.

In *Home Lodge case*, 174 S. W. 487, the provisions of the bond are set forth at page 488. In passing, we wish to state that in that case it was pleaded, just as it is pleaded here, that the last extension had been obtained through misrepresentation and fraud; that the certificate given by the Lodge upon which the renewal was claimed was false and known to be so. It seems this company has a habit of setting up fraud when charged with liability.

The language of the bond in the *De Jernette* case, 98 Ky. 558, is as follows:

“Provided,—that on the discovery of any such fraud or dishonesty as aforesaid, the employer shall immediately give notice thereof to the company and that full particulars of any claim made

under this bond shall be given in writing, addressed to the company's secretary at its office in the city of New York, within three months after the expiration of this bond."

The words "or renewal thereof" are omitted. Neither does it contain the words "or any subsequent renewal of such term." Neither does it contain the language "committed during the continuance of said term or any renewal thereof." The renewals in the *De Jernette* case read as follows:

"The contract under bond No. is hereby renewed in accordance with the tenor of the bond, the guaranty to cover the period above named *only*."

An express statement that it is limited to the period named "only."

The court held that it was not an enlargement of the previous contract, and that the making of the new contract did not in any wise affect the rights of the parties under the previous contract either to enlarge or diminish them.

As was stated by the Court in the case of *U. S. Fid. & Guaranty Co. v. Bank of Monticello*, 147 Ky., and for reasons given in that opinion, the result of the decision in the *De Jernette* case was to leave the giving of surety bonds in a condition unsatisfactory to persons desiring such indemnity. The consequence was that in response to what must have been a public demand, the surety

companies issued policies binding them throughout continuations of a bond for acts committed during continuance of the suretyship. This new form of bond contains agreements that renewals or extensions of the same should renew and extend the original obligation throughout the period of such extension, which constitutes said bonds one continuing contract.

“It is reasonable to presume that, because of the construction placed upon the contract in the *De Jernette* case, that portion of the public wanting indemnity insurance, required a different contract, as it seldom occurs that embezzlement or larceny is detected within three, six, or twelve months after committed, especially if the employe has been in the service of his employer for some time and is trusted by him and is shrewd. Therefore, in order to obtain business, the indemnity and guaranty companies gave them a contract which would protect them.”

U. S. F. & G. Co. v. Bank, 147 Ky. 285, 143 S. W. 997.

Clearly the contract for the last period was meant to be a mere continuation of the bond originally given. Besides this, the language of the original shows that a continuation is contemplated, and that an increase of the period for which the company shall be liable to the insured is intended, in case there should be such continuance of the suretyship.

The defendant company, in the light of the

De Jernette decision, has employed language which the courts held, obligated it to the assured as upon one continuing contract. It sold the Miners & Merchants Bank a bond containing such language, and then for consideration continued the same for eight consecutive years.

Had this company felt at the time it gave this bond that it was likely to be held to an obligation which it had not intended to assume, or which it was unwilling to continue to assume, it should, in good faith to the insuring public *and acting in good faith with the bank*, have so altered the form of its bond before it executed the original containing the renewal provisions, as to make it clear by apt language that it did not intend to so obligate itself. The English language afforded ample means to the surety company to make it clear that it did not mean to be bound continuously by continuing a contract from year to year, if it did not mean to be so bound.

Is it reasonable to suppose that if the bank had had the slightest intimation that the Surety would contend for any such construction, it would have accepted this bond in the first instance, or would have continued from year to year to pay the premiums for its continuation?

TESTIMONY IMPROPERLY REJECTED.

When the bank offered to prove all the allegations of its pleadings, the following objection was made:

“MR. DOVELL: To that we will object upon the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms.” (Tr. p. 121).

It is worthy of note, that counsel spoke of the contracts, using the plural, thus conceding that *all the contracts* must be construed together. Yet, the Honorable Trial Court treated the last one as standing alone and as being entirely isolated from all the others.

In the original motion to exclude testimony, counsel stated: “having in mind the pleadings and the opening statement of counsel, I move to exclude the testimony touching,” etc. (Tr. p. 86).

Nothing was said about parol testimony.

The Honorable Trial Court, having proceeded upon the theory that the continuation was a separate and independent contract, held, that we could not show the relations which had existed between the parties prior to the date of that instrument.

He held that we could not go back and show that we had the former bond and intervening continuations. He seemed of the opinion that we were seeking by parol to vary the terms of the last contract.

We submit:

First: There is no justification for the assumption that we were going to rely upon *parol* testimony.

Second: That if necessary, parol testimony was admissible under the pleadings.

1st. (a) There is no allegation in the bank's pleadings in relation to parol testimony, and nothing from which it may be gleaned that the testimony was to be by parol, or what class of testimony would be offered.

(b) There is no word in the opening statement of counsel for the bank to the effect that the testimony would be by parol. The statements of counsel being that the bank would *prove the facts*.

(c) The offer of proof made, contains no statement or reference to parol testimony. It says, "offer at this time to prove," etc. (Tr. p. 120).

(d) When this offer was made, one counsel for Surety interrupted as follows:

“MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?”

“MR. ROBERTS: I have both written and oral evidence to prove that fact.” (Tr. p. 121).

(e) Reference is made in the bond to the application signed at the time the contract was initiated. We want the right to introduce this written application, and the written application may prove all that we claim.

(f) Surety in its answer pleads that, at the time of the issuance of the bond, and at the time of the various continuations thereof, and as a condition of the bond and continuations, the bank made certain agreements with the Surety in relation to examination of the books and accounts of Mitchell to the end that any loss might be avoided, etc. (Tr. p. 50). It has not pleaded whether these alleged agreements were in writing, or parol. If they exist they are presumably in writing, and form a part of the contract, and the bank would be entitled to introduce them in evidence. The bond however shows that they were actually in writing.

(g) The bond provides: “It is understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, *unless otherwise stipulated between the Employer*

and the Company.” This does not state the manner nor form of the stipulation, whether oral or written. It does not say that unless otherwise stipulated “in writing.”

The bank alleges fully in its pleading that it was otherwise stipulated and agreed, and that is one of the things it offered to prove and wants to prove in the case.

Since no evidence was received by the court, and there is nothing in the record to the contrary, this Honorable Court may not now presume that the alleged stipulation was not in writing, because every doubt in the construction of the language of the bond, is to be resolved against the Surety.

This exception establishes that the bond was subject to modification by stipulation. That a continuation was anticipated. That the company was willing to so modify it as to allow a stipulation for continuous insurance. The bank alleged in the pleadings and asserted at all times that it had been otherwise agreed, and why we were deprived of our right to prove that it had been “otherwise stipulated,” we cannot understand.

(h) Counsel for Surety, in opening stated:

“The notice was received, of course, by Mr. Mack Mitchell himself, who was the only one in the bank at Ketchikan. He thereupon notified us

that they did not desire a *renewal of the bond*.” (Tr. pp. 78, 79).

Bank in its reply alleged that, although the Surety had at all times dealt with officers of the bank at Seattle, Washington, and at all times collected its premiums there, and with knowledge that they were such officers and were in Seattle, did take up the matter of continuing said bond with Mitchell; that this written communication in relation to the continuation went to Mitchell without the knowledge of the officers of the bank, and that Mitchell concealed it from the bank, and that the bank never had any knowledge of the offer of the Surety to continue the bond, and never knew that Mitchell had notified the Surety that he, Mitchell, did not want it continued. That when the matter was called to the attention of the bank, it immediately called it to the attention of the Surety, and the Surety admitted its mistake and immediately executed the continuation. (Tr. pp. 54, 56).

The Honorable Trial Court seemed to labor under the impression that this letter had gone to the bank.

“MR. ROBERTS: And we have here the letter, as I said, of the company, writing up there, and offering this bond as a renewal.

“THE COURT: And your bank didn’t take it.

“MR. ROBERTS: The bank never knew it, if the Court please. The bank never knew it. Bear in mind that Mr. Mitchell didn't have this bond written on himself, and never did. He had nothing to do with it. * * * Now then, the risk gets the letter, conceals it from his bank, conceals it from the party that demanded the protection and should have had the protection, and sends it back, and says that he does not want it renewed, and the bank knows nothing about it. * * *

“THE COURT: It was sent to the bank, I take that from the statements of both of you.

“MR. ROBERTS: No, it was sent to Mitchell.

“MR. DOVELL: It was sent to Mitchell, yes.”
(Tr. pp. 108, 109).

So that, according to the record, which is the exact fact, the letter was addressed to Mitchell at Ketchikan, and went to Mitchell, not the bank. And the statement of counsel for the bank to the court was, “we have here the letter, as I said, of the company, writing up there, and *offering this bond as a renewal.*” That statement was before the court, and upon the motion must be taken as true.

Miller v. Md. Cas., 193 Fed. 347.

We contend that this letter proves that the bank tendered and offered this bond as a continuation of the insurance. It is at least evidence of that fact. The writing of the letter stands admitted in the record. The date of it, to-wit, at the very time the bond was to be continued, is admitted. And

it establishes that the company then considered itself obligated under its contract to continue this insurance, and that is not *parol evidence*.

(i) The Surety admits the bank paid a premium for the last contract but says when the storm burst and the bank needed protection it tendered it back. For what was that premium paid? They say the date was November 25th, 1913. The instrument on its face says it is insurance from April 1, 1913. The presumption must be that the premium paid for insurance from April 1st to some future date. Why from April 1st, if it was not by agreement and as a mutual understanding that it was to cover the period then elapsed and avoid any question about the six months. The contract says: "during the period commencing upon the date hereof." (Tr. p. 29). As it dates from April 1st, the burden is upon defendant to prove that it did not become effective on that date. If it did become effective April 1st, then there was no six months lapse, and as a matter of law, no forfeiture.

(j) Counsel for Surety stated that Mitchell was a trusted employe, (Tr. p. 76) and that so great was the confidence of the bank in him that it made but one examination. The Surety likewise had great confidence in Mitchell and with equal opportunity with the bank to detect any

“flaw,” it continued to write him as a risk, and when the bank went to the company for this renewal, it said: “Oh, well, we did neglect to renew your bond on time but it will make no difference that the six months has passed. We will fully protect you. Mitchell is just as safe now as he has been for the last seven years, and so we will just date it back and preserve the continuity of the insurance. We are willing to take that chance for the premium.” *The bank paid the Surety to take just that chance.*

(k) The Surety admits that it would have continued Mitchell’s insurance on April 1st, and admits and states that it did actually try to continue it at that time. What possible difference can it make whether it extended it April 1st, or November 25th, since it was continued for a period “commencing upon the date hereof,” viz: on April 1st, thus continuing the insurance in an uninterrupted sequence.

(l) To establish that the bank had a contract for continuation of a bond which expressly provided for continuation, is not to vary the terms of the contract. The last contract is dated April 1st, 1913, and is to continue until terminated by notice. It is not as the Court and counsel both treated it, a bond for one year, nor an annual contract.

Therefore, we do not seek to vary or to modify its terms so far as its date is concerned, or its termination, or as to the signature, or amount, or the man insured against, or as to a single provision contained in it.

(m) Finally, we urgently insist that this instrument carries upon its face the mute evidence that it is a mere continuance of the contract of insurance. If not so, then it is so ambiguous that parol evidence is entirely competent.

The Honorable Trial Court fell into the grievous error of treating this as a bond from April 1st, 1913, to April 1st, 1914, whereas, it is in itself a continuing contract of insurance. **IT HAS NO DATE OF TERMINATION.** We quote: "and during the period commencing upon the date hereof and continuing in the sum of **TWENTY FIVE THOUSAND (\$25,000) DOLLARS** until the termination of this insurance." (Tr. pp. 29, 30).

"3. This insurance shall only terminate by:

(1) The Employer giving notice in writing to the Insurer specifying the date of termination.

(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases).

(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

(4) The discovery of any loss through the Employee." (Tr. p. 30).

Therefore, instead of requiring a renewal certificate from year to year, it automatically continues in force until such time as either the insured or the insurer shall by *written notice*, cancel it.

The word "annual" is not in this instrument. It says *all premiums* are due in advance, showing that the company expected to collect additional and "continuing premiums."

The original bond insured from April 1st, 1906, to April 1st, 1907. (Tr. p. 21). Nothing of the sort is contained in the last continuation. (Tr. p. 29). Showing that this instrument is a mere continuation certificate. Showing that it was issued not as an original contract of insurance but a continuation of a former insurance, and so worded that it would not thereafter have to be re-executed from year to year, "continuing in the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS until the termination of this insurance."

How in the light of this language in this instrument, may this company be allowed to say that it never did write and never intended to write a continuing insurance? Counsel in argument to the Trial Court stated:

"Your Honor can readily see that no liability company could write a policy unless it had some such provision. It would never know that its liability had terminated." (Tr. p. 95).

While the very instrument then before the court was a perpetual insurance, unless terminated by notice, or loss.

The *bond* of April, 1906, is called "FIDELITY BOND," (Tr. p. 20). It contains twenty-one paragraphs and the word "BOND" is used in it thirty-five times. It is even in the attesting clause. It is the only instrument throughout the contract, which is called a "bond." The last one, Exhibit "C", (Tr. p. 29), nowhere contains the word "bond." It is not designated as a bond, and the word "bond" occurs nowhere upon nor within it. It contains but one paragraph with three short provisos. It provides:

"This insurance shall only terminate by:

(3) The nonpayment of premium for a period of three months beyond date due; all premiums being due in advance." (Tr. p. 30).

On what date is this premium due? You cannot find out from the instrument. Is it a quarterly premium, a semi-annual premium, or annual? At the beginning it says: "The insurer for a premium of \$62.50," but it does not say an "annual" premium. The word "annual" cannot be found in the instrument. The word "year" is not in it. It may be that the company has increased its premium to \$125 per year, and that the \$62.50 is but a semi-annual premium. The instrument is silent,

and the matter must be determined by some evidence *dehors* the record if this instrument is to stand alone. The bond in the case uses the term "annual premium," (Tr. p. 20), and in the body of it, it says the premium is for a period of one year. Therefore, to determine that this \$62.50 is an annual premium, and that it is payable from year to year, you must turn back to the *bond*. The two must be read together, and when the two are construed together, it means that there must be paid an annual premium of \$62.50, and that it must be paid from year to year in advance.

Again, "during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS until the termination of this insurance." Until the termination of this "insurance," not until the termination of this "bond." Not until the termination of *this* contract, but until the termination of *the insurance*. What insurance? The insurance originally written and continued. And you must turn back to the bond to determine what insurance is being continued. In other words, this last instrument simply continued the insurance modifying it to some extent as to conditions.

To avoid writing a continuation each year the company continued this one by giving a certificate

which, like the brook, goes on forever. It was probably done to avoid further oversight about continuation on time, and to assure the bank there would be no future trouble about continuation.

Silliman v. International Life Insurance Company, 174 S. W. 1131, is a case from the Supreme Court of Tennessee, decided March, 1915. There was involved the question of whether or not a life policy continued the terms of a former policy. The defense was made by the company, among other things, that the premium rate was different in the two bonds, and that the latter contained different terms, and therefore, the two were independent isolated contracts. We are making the point here that this surety took but the one application, and that in May, 1906. The fact that the second bond was written in the above case without application is a point which is given much consideration by the Tennessee Court, in holding that the second bond was a continuation. We quote:

“It seems to us quite clear that under the facts stated the new policy was but a continuation of the same insurance contract. *It was based on the old application* and the old medical examination.” p. 1132.

“The differences between the policy sued on in *Gans Case* and that before us are now apparent. Not only is there nothing to show that the policy of 1914 is ‘an independent, complete and isolated contract,’ expressing no dependence on or connec-

tion with the term policy, but, on the contrary, it is expressly shown that they are connected and that the second was issued because of and in compliance with the agreement therefor in the first policy."

"Furthermore, the suicide clause in the policy sued on does not refer to the date of this policy, but 'within one year from the date on which this insurance begins.' It is true that if the policy stood alone, 'this insurance' would have to be construed as referring to the date of the policy; but it appearing from what we have already said that the dominant purpose was to carry out the contract embraced in the policy of 1910, this clause must be held to apply to the date of that policy, since it was then that 'the insurance' began. Any other construction would result in giving an effect to the clause in question which would nullify the whole tenor of the contract between the parties."

Silliman v. International Life Ins. Co., 174 S. W. 1131.

Counsel for Surety in opening statement said:

"Then in November sometime they come to us and say, 'How is it that *that bond* was not issued in April? We *wanted that bond*. We want *that bond* and will you kindly write it and date it back to April 1st?' " (Tr. p. 80).

The Surety admits that it did kindly write it and date it back to April 1st. It accepted the proposition and took the money. But counsel says:

"We were tricked into writing the last bond." (Tr. p. 81).

These admissions of counsel prove our entire contention. The bank did not go to the Surety and say it wanted to take out some new insurance

upon one Mack Mitchell, but inquired why the Surety had not kept its agreement and extended the insurance it had and said it still wanted it at that time. That is, it wanted the extension. Then comes the entirely conclusive statement: "We want that bond." Not some new independent contract; not something different, but "that bond." That is to say, the original bond according to the agreement, but not some new isolated contract. "And will you kindly write *it* (that is, the bond originally agreed upon; not a new one) and date it back to April 1st?" (That is to say, the date you should have written it). To all of which the Surety now admits it assented, but says it was tricked into the assent. On that point we will meet them at Armageddon—before the jury.

There is here no question of the statute of limitation. We made the discovery and notified the Surety within about two years from the time of the first breach of the bond, the defalcations continuing, however, right up until the time of the discovery. The sole contention on this point is, that we failed to make the discovery within a period of six months from the time at which our insurance expired. Bank made the discovery in little more than two months after the six. Counsel contends that at the time bank made discovery, his company had no bond in force.

"I expect the evidence to show you that the plaintiff, the Miners & Merchants Bank, had no bond of our company." (Tr. p. 75).

Page 79, Counsel states that the Surety is not liable unless the bank discovered the loss within six months from April 1st, 1913, that is the date of the last instrument, and that contract clearly was in force at the time we made the discovery, unless as they pleaded, we had procured it through fraud, and that must be a question of fact for the jury. The Trial Court found that instrument to be in force and gave judgment for \$688.27 on account of it.

In *Eilers Music House v. Hopkins*, 73 Wash. 281, the bond contained the provision that an action must be instituted within six months after the completion of the work. The court said:

“In this case, while the action was not brought within six months after the work was completed, there was evidence to the effect that the suit was delayed at the request of counsel for the Surety Company. The Court heard this evidence and no doubt believed that state of facts. It follows, of course, that where there was a delay at the request of the surety company or its representatives, it cannot be heard to say that the action was not brought within time. In other words, the court properly found upon sufficient evidence that there was a waiver of both these provisions of the contract by the Surety Company.” p. 284.

In *Ilse v. Aetna Indemnity Co.*, 69 Wash. 484, the same Court said:

“To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together.”

The bond recites: The employer “has filed with **THE UNITED STATES FIDELITY AND GUARANTY COMPANY**, hereinafter called ‘The Company,’ an application,” etc., showing that the application was in writing. The employer has “delivered to the Company certain representations and promises,” likewise in writing. Then there are all the subsequent contracts and transactions continuing through a period of eight years, and the entire transaction must be treated as a whole. We will be able to show complete waiver.

The bond guaranteed all loss “which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter.” The continuance of what term? The term of the insurance. The insurance has been continuous and that is not disputed. That is to say, there was at all times an instrument of some character in force. Not a day elapsed but that this company had a bond on Mitchell in the same amount. The insurance never lapsed, and counsel has wholly and utterly failed to differentiate between the insurance and the instruments themselves.

Counsel reads this language to mean that the discovery must be made within six months after the expiration of each instrument. But it would seem that language could scarce have been made plainer to express the intention that it is six months

after *the expiration of the insurance*, not any one instrument.

The term had continued for eight years, and we are going back only two years.

"Suretyship is a fact collateral or extraneous to the contract itself rather than a part of it, whether the instrument be under seal or not."

Spencer on the Law of Suretyship, Sec. 2.

The unconditional acceptance of a past due premium on a life insurance policy is a waiver of the condition that nonpayment of premiums will cause the policy to lapse.

Clifton v. Mutual Life Ins. Co., 84 S. E. 817.

PAROL TESTIMONY ADMISSIBLE.

"The statute of frauds has no application to insurance generally."

Frost on the Law of Guaranty Insurance,
p. 34.

"Since a contract of insurance can rest in parol, it follows as a necessary corollary that generally *a policy may be renewed by parol*; and this seems to be true, even though the policy requires the renewal to be acknowledged by a writing."

Cooley's Briefs on the Law of Ins., Vol. 1,
p. 398.

Carey v. Nagle, 5 Fed. Cas. 60.

"That an insurance company can, by a preliminary parol contract bind itself to issue or *to renew a policy in the future* seems too well settled to admit doubt."

McCabe Bros. v. Aetna Ins. Co., 9 N. D. 19,
47 L. R. A. 644.

“Contract of insurance may be in writing, or may be verbal, or partly in writing and partly verbal.”

Rankin v. Northern Assurance Co., 152 N. W. 325.

“In *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 321, 15 L. ed. 636, it was held by the Supreme Court of the United States, that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note.” 47 L. R. A. 644.

“The issuing of a policy furnishes a convenient mode of proving the contract, but it is not essential to its validity.”

Walker v. Metropolitan Ins. Co., 56 Me. 371.

“In answer to this question we are confronted at the outset with the proposition that the statute of frauds has no application to insurance generally. Is guaranty insurance to be the exception to the rule? A careful consideration of this question leads inevitably to a negative answer. This conclusion is based partly upon an analysis of the contract of guaranty insurance itself, and partly upon an examination of the authorities bearing upon the proposition now before us. The analysis here referred to brings us certain salient features, all of which have a direct bearing upon the question of the applicability of the statute of frauds to guaranty insurance. *These are the unquestioned intention on the part of the guarantor (the insurer) to benefit itself by securing a premium; the creation of a new contract between the guarantor and the party guaranteed; the recognition of a future rather than of a present liability, and this invariably*

a contingent one; the presence of a new consideration, the premium, whether running from the party guaranteed or from the principal himself."

Frost, p. 34.

"Whenever the contract of guaranty is founded upon a new and valuable consideration with the immediate object of subserving some pecuniary or business purpose of the guarantor, then such a guaranty is not within the statute of frauds, even though it has the legal effect of discharging the debts of another."

Frost, p. 35.

"Whenever the main purpose and object of the promisor is not to answer for another but to subserve some business or pecuniary purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form the promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability." *Ibid*.

Slater v. Emerson, 60 U. S. 244.

National Bank of Ashville v. Fidelity & Casualty Co., 89 Fed. 819, Circuit Court of Appeals, Fourth Circuit:

"This issue was whether or not in November, 1893, the defendant company through its agents, had agreed to renew the bond." p. 821.

"Barnard testified that a few days after the interview with Stikeleather in November, he met Rawls on the street and said to him that he had decided to continue the insurance in the defendant company, and that the bank would pay for the renewals, and he would either send the money over or that Rawls could send and get it, and he testified that

Rawls said 'all right.' It was conceded in the trial of the case that if this conversation to which Barnard testified, but which Rawls denied, took place, it constituted a contract for renewal, which bound both the bank and the defendant company; and that, as it was before any suspicion of Pulliam's dishonesty arose, his bond was in force whether the premium had actually been paid or not, *as the alleged conversation amounted to an agreement to keep the bond in force, and give further credit for the renewal premium.*" p. 822.

"It does, however, appear that this issue was fairly put to the jury, and it appears to us that the court's instructions on that point were at least as favorable to the plaintiff as it was entitled to." p. 822.

"The judge in another part of his charge repeated this instruction and commented upon the contradiction in the testimony of the two parties as to whether such a contract was made, and directed the attention of the jury to the requirement that the parties to it must have agreed together, and the two minds coming to an agreement; and in the end he left the issue to be determined by the jury upon the testimony." p. 823.

It was held in Pennsylvania that even the law requiring all applications and statements made, upon which insurance was based, to be attached to the policy, does not, by implication, change the established rule in regard to oral contracts.

Lenox v. Greenwich Ins. Co., 165 Pa. 575, 30 Atl. 940.

Cooley in Vol. 1, at page 400, states that where there are special statutes or charters requiring insurance policies to be signed by the proper officers,

they do not preclude the companies from making oral contracts.

In *Brown v. Franklin Mutual Fire Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534, the Supreme Court of Massachusetts said, that it could see no reason why the general rule should not apply to mutual companies, unless there was something in the statute or in the by-laws of the company which prevented such companies from contracting by parol.

“It appears to be the general rule that an oral contract of insurance is not within the statute of frauds.”

Cooley's Briefs on Law of Ins., Vol. 1, p. 402.

The author cites list of authorities.

“In *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, an oral contract of renewal from year to year subject to termination at any time, was held not to be within the statute of frauds. * * *

“An agent who is authorized to take risks can make oral contracts binding on his company.”

Cooley, Vol. 1, p. 403, and list of cases cited.

“If the company agreed that the policy should be a permanent one, that is to say, renewed from year to year, without further application, until notice to the contrary, it will cover a loss occurring after the expiration of the original term, and before the renewal certificate is actually issued.”

Trustees of Baptist Church v. Brooklyn, 18 Barb. 69. ,

Although the original contract may provide that it shall not be altered or modified unless the agree-

ment therefor be evidenced in writing, yet a subsequent agreement by parol to alter or modify, will be as valid as if no such stipulation had been made.

Home Ins. Co. v. Gaddis, 3 Ky. Law Rep. 159.

It was provided by an open policy that before insurance could be affected or modified by an agent of the insurer, the same should be made on the policy, or by the issuance of a certificate. Held, that the policy could be modified by parol.

Day v. Mechanics & Traders Ins. Co., 88 Mo. 325.

A policy may be modified or rescinded by subsequent verbal agreement which is supported by the mutual assent of the parties.

Mobile Life Ins. Co. v. Pruett, 74 Ala. 487.

If a binding slip is informal, its legal effect as an agreement may be made known by parol evidence of custom.

Underwood v. Greenwich Ins. Co., 161 N. Y. 413.

Parol evidence is admissable to show the acts and declarations of an insurance agent in writing the answers to questions in an application for life insurance, although it may contradict answers written by him.

Marston v. Kennebec Mut. Life Ins. Co., 89 Me. 266.

Jennings v. Metropolitan Life Ins. Co., 148 Mass. 61.

Although a policy provides that nothing less than a written agreement endorsed on it will

suffice to establish a waiver, it may, nevertheless, be shown by parol that insurer has waived.

Mix v. Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460.

Parol evidence is admissible to show that insured informed insurer's agent that building stood on leased land, although the policy provided that no waiver should be effectual unless endorsed on it.

Insurance Co. v. Nat'l. Bank, 88 Tenn. 369, 12 S. W. 915.

Parol evidence is admissible to show that when insurer issued the policy it had knowledge of the existence of other insurance, and is therefore estopped from claiming that it is not liable because its policy prohibited other insurance.

Fireman's Fund v. Norwood, 69 Fed. 71.

Glover v. National Fire Ins. Co., 85 Fed. 125.

Insured may show by parol that his policy was issued by an agent with knowledge that he intended to procure other insurance, and that the property covered by it was encumbered, notwithstanding it is provided in the policy that it shall be void in either such case unless insurer's consent thereto is endorsed thereon in writing.

McElroy v. British American Ins. Co., 94 Fed. 990.

Although a policy provides that its conditions may be waived only by the written consent of insurer's secretary, a waiver may be shown by parol.

Alabama Mut. Ins. Co. v. Long, 26 S. Rep. 655.

Insured may testify in an action to recover damages for the breach of a parol agreement to renew a fire policy, that he relied upon such contract and would have procured other insurance had he not believed that the policy was renewed.

McCabe v. Aetna Ins. Co., 81 N. W. 426.

Insured's agent may testify concerning statements made by him to insurer's agent when the policy was procured.

Insurance Co. v. O'Connell, 34 Ill. App. 357.

Where an agent is a medium of communication between insurer and insured, evidence of a conversation between the agent and insured is admissible, regardless of the scope of the agent's general authority.

Medearis v. Anchor Mut. Fire Ins. Co., 104 Ia. 88.

"It is established in England, after some fluctuation that a promise to indemnify or save harmless one who is himself answerable or to become answerable for the debt or default of another is not within the statute of frauds and hence need not be in writing. This view of the law has been adopted by most of the courts of this country."

Spencer on the Law of Suretyship, Sec. 75.

"The objection that such evidence tends to vary or contradict a written contract, being met by the answer that suretyship is a fact collateral or extraneous to the contract itself rather than a part of it, whether the instrument be under seal or not." Ibid, Sec .2.

The bond in this case provides for the signature of the "risk" Mitchell, and this same company has on several occasions refused payment of its bonds because the "risk" had not signed, but every such case has been decided against it.

Prosser Power Co. v. U. S. Fid. & Guar. Co.,
73 Wash. 304.

Proctor Coal Co. v. U. S. Fid. & Guar. Co.,
124 Fed. 424.

U. S. Fid. & Guar. Co. v. Haggart, 163 Fed.
801.

Proctor case is the one upon which the Surety relies here. It is held that the delivery of the bond and the acceptance of the premium is a waiver of this condition, and the company is estopped.

The bond in question is not signed by Mitchell; the Surety is not raising that question, although it is otherwise relying upon the provisions of the bond which says none of its conditions may be waived, except in writing.

In *Parsons v. Pacific Surety Co.*, 69 Wash. 595, it is held that although a surety bond contained a provision that there should be no liability unless written notice of default was served upon the company at its home office, this provision might be waived and that notice on the local agent was sufficient notwithstanding the policy contained clause against waiver, and expressly by its terms, required the notice, and that it must be given at home office.

The following Washington decisions are to the same effect:

U. S. Fid. & Guar. Co. v. Cowles, 32 Wash. 120.

Pac. Bridge Co. v. U. S. Fid. & Guar. Co., 33 Wash. 47.

Trinity Parish v. Aetna Indemnity Co., 37 Wash. 515.

Gritman v. U. S. Fid. & Guar. Co., 41 Wash. 77.

Sheard v. U. S. Fid. & Guar. Co., 58 Wash. 29.

Parsons v. Pac. Surety Co., 69 Wash. 595.

Eiler's Music House v. Hopkins, 73 Wash. 281.

“That an insurance company can by a preliminary parol contract bind itself to issue or to renew a policy in the future seems too well settled to admit doubt.”

McCabe Bros. v. Aetna Ins. Co., 9 N. D. 19 47 L. R. A. 644.

“The defendant concedes that the policy which was to be renewed under the terms of the parol agreement was the policy of the defendant, and that the same was issued by McBride as agent, with full authority to do so, and it seems unreasonable to suppose that the parties in making this parol agreement believed that they were dealing with McBride personally, instead of in his capacity as such agent. If the parol contract to renew had been fulfilled by McBride, it would have been done as agent.” Ibid 642.

Here the renewal certificates from year to year show that the renewals were made by the same agency which had originally written the bond.

See *Commercial Union Assur. Co. v. State ex rel Smith*, 113 Indiana 331, 15 N. E. 518; *Post v. Aetna Insurance Co.*, 43 Barb. 361. Oral contract to renew insurance contract held valid.

“The possession and use of the defendant’s certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances had been conferred upon this agent.”

43 Barber 351.

It was held that the oral agreement to renew the insurance was a valid agreement.

“In *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 321, 15 L. ed. 636, it was held by the Supreme Court of the United States, that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note.”

47 L. R. A. 644.

In *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305, the Supreme Court of New York sustained the validity of the unwritten agreement to continue a policy of insurance from year to year until notice to the contrary should be given, and that, notwithstanding the policy provided it might be continued, provided the premium therefor was paid, *and endorsed on the policy*, or receipt given for it, and that no insurance whatever, original or continued, should be considered binding until the actual payment of the premium.

“Certain errors are assigned on the admission of evidence. We have examined the rulings complained of, and we do not find any prejudicial error. That evidence of custom on the part of McBride, the agent, to extend credit for premiums, was admissible, see *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 418, 21 N. E. 1000; *Church v. LaFayette F. Ins. Co.*, 66 N. Y. 222, 225; *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep. 384; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 558, 22 L. R. A. 768, 35 N. E. 1060, 1064; *Cohen v. Continental F. Ins. Co.*, 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296. The testimony of James McCabe, to the effect that he relied upon the contract to renew, and that they would have procured other insurance had they not believed that the policy was renewed, was not, we think, prejudicial under the circumstances, and could not have misled the jury.”

47 L. R. A. 645.

Wilson v. German American Ins. Co., 146 N. W. 945, Supreme Court of Nebraska. The parties to a contract of fire insurance may agree orally to renew such contract, and the evidence in the case was held sufficient to show that the agent did agree to renew.

“If the local agent of a fire insurance company has, by agreement, renewed a policy of insurance from year to year and such agreement has been acted upon by the company, the fact that the insured knew that the agent had no authority to waive the written conditions of the policy, will not estop him to assert that the agent was authorized to so renew the policy.” Ibid.

In *Firemans Fund Ins. Co. v. Searcy, et al*, 80 S. E. Ct. of Appeals of Kentucky, it was held, in-

insurance agent having authority to solicit insurance, settle the terms of insurance and to issue and renew policies, has authority to make a parol contract to issue or renew a policy. Evidence in that case held to sustain the finding that the defendant's agent did renew the policy.

Sun Ins. of London v. Mitchell, 65 Southern 143, Supreme Court of Alabama:

"An agent duly authorized to bind his company by contracts for insurance may make valid contract by parol, or by binding slip or memorandum. And a general authority to solicit insurance, receive premiums and deliver policies is sufficient to cover an executory contract to insure." Syllabus.

"Whether the minds of the insurer's agent and insured met upon the terms of an oral contract of insurance, held, under the evidence, for the jury." Syllabus.

The actual representations made by insurer's agent may be proved by parol, although they were incorrectly reduced to writing by the agent.

German Amer. Ins. Co. v. Hart, 43 Neb. 441, 61 N. W. 582.

Where the policy does not declare the intention of the parties, parol evidence is admissible for the purpose of showing what the contract was, and making its meaning clear.

Milwaukee Mechanics Ins. Co. v. Brown, 3 Kan. App. 225.

A verbal promise made by one of the parties at the time a written contract was executed, if it

was made to obtain the execution of it, may be proven.

Royal Ins. Co. v. Walrath, 17 Ohio Ct. Court 509.

The issue being whether a life policy was a speculative and wagering one, it is competent for insurer's agent to testify as to the negotiations which preceded the application.

Equitable Life Ins. Co. v. Hazelwood, 75 Tex. 338, 12 S. W. Rep. 621.

That a standard form is prescribed by statute does not invalidate a parol contract of insurance evidenced by a binder, intended to cover the property up to the issuance of the policy.

Lea v. Atlantic Fire Ins. Co., 84 S. E. 813.

Parol testimony is admissible to show that both parties understood when the contract was affected that the policy on barn, sheds and additions attached, covered sheep and hog-pens.

Cummings v. German American Ins. Co., 46 Atl. 902.

The consideration and purpose of an assignment of a life policy, although the assignment is absolute in form, may be shown by parol.

Kendall v. Equitable Life. Ins. Soc., 171 Mass. 568.

Parol evidence is competent to show that insurer's agent agreed that an endorsement should be made on the application giving plaintiff the right to place an encumbrance on the insured property.

Copeland v. Dwelling House Ins. Co., 77 Mich. 554, 43 N. W. 991.

Parol evidence is competent to show that agent knew of other insurance and was instructed to make the proper endorsement.

Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883.

The mistake of insurer's agent may be proved by parol, although a policy provides that the description of the property shall be a contract and a warranty.

Dowling v. Merchants Ins. Co., 168 Pa. St. 234.

Virginia etc. Ins. Co. v. Goode, 95 Virginia 762.

Parol testimony is admissible to show that insurer's agent knew the property was encumbered, although the policy stated otherwise.

Dick v. Equitable F. & M. Ins. Co., 92 Wis. 46.

Chenier v. Insurance Co. of N. Amer., 72 Wash. 27, an oral contract to issue fire insurance policy was under discussion. While in that case an action for damages was instituted for failure to renew a policy, the court held, first, *that an oral contract to renew an insurance policy is valid*; second, that an oral agreement for insurance is valid.

“On September 1st, 1908, respondents entered into an oral contract with appellant through its agent, by which it agreed that, upon the expiration of the policy on January 1st, 1909, a new policy should be executed, in other words, that the insurance should then be renewed.”

The court in that case refers to *Hardwick v. State Ins. Company*, 24 Ore. 547, where a part of the oral agreement was that the new policy should commence July 20th, 1889, as though the policy had been actually delivered on that date. Oral evidence was received of a contract that the policy should become effective as from a certain date. The last continuation in the case at bar is dated April 1st. Counsel allege in their pleadings and asserted at the hearing that, as a matter of fact the extension was not executed upon that date, but in November following. Can there be any question but that the actual date of this instrument and the circumstances surrounding its execution are proper subjects of inquiry by parol evidence? There are many authorities holding that the true date of such contracts may be shown. The very fact that an issue is raised as to the date of its execution makes it subject to parol evidence.

The question of whether or not this instrument was executed in continuation of the former bond is a part of the subject matter, and is no more sacred than the question of the date of the execution, and the time it was to take effect. To say that it is a renewal or continuation is not to change its terms, the Surety having conceded in both its pleadings and its statements that for eight years it had been writing this risk, and accepting the premiums. We say that it was to take effect April 1st. That is the date of the document, but it is otherwise

silent as to when it takes effect, therefore we do not change the terms. We say that is the date to which the insurance had been continued. We say the transaction of April 1st, 1913 (or whenever it did occur), continued the contract of insurance until terminated. The Surety denies this because it says we fraudulently procured the continuation. That is all a question of fact for a jury, and the crux of the defense.

We pleaded:

(a) That originally, and as an inducement to procure this business, the Surety agreed to keep it in force. That it ratified this from year to year by extensions and accepting premiums.

(b) That at the time the last instrument was given, it was agreed that it should be and was in continuation of the insurance.

“An oral promise made by one party in consideration of the execution of a written instrument by the other may be shown by parol evidence.”

17 Cyc. 477.

“It has been held that where the execution of a written instrument has been induced by an oral stipulation or agreement made at the time, on the faith of which the party executed the writing, and without which he would not have executed it, but such agreement or stipulation is omitted from the writing, even if its omission is not due to fraud or mistake, evidence of the oral agreement or stipulation may be given, although it may have the effect of varying the contract or obligation evidenced by the writing, where there has been an attempt to make a fraudulent use of the instrument in viola-

tion of such promise or agreement, or where the circumstances would make the use of the writing for any purpose inconsistent with such agreement dishonest or fraudulent. This rule is put upon the ground that the attempt by one party afterward to take advantage of the omission of such terms from the contract is a fraud upon the other party who was induced to execute it upon the faith of such promise, *and hence he will be permitted to show by parol evidence the truth of the matter.*”

17 Cyc. 693.

“The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show prior or contemporaneous collateral parol agreements between the parties. Nor is it necessary in order to render evidence of an independent collateral parol agreement admissible that the written agreement should contain any reference thereto. Existence of the alleged collateral agreement is a question for the jury.”

17 Cyc. 713, 714.

“It was error for the court to refuse to permit the purchaser to testify what it was that took him to defendant to buy goods, since such examination was admissible to show the circumstances that caused the purchaser to go to defendant to buy goods, in order to show the improbability of the sale’s having been made through plaintiff’s solicitation.”

Wheeler v. Buck, 23 Wash. 679.

“While the terms of a written contract may not be varied by parol, it is competent to show that, at the time of the making of a written contract of sale of land to a railroad company for a specified consideration, there was a collateral oral agreement to the effect that certain fences and guards were to be built and maintained by the company as part of the consideration for the sale, since oral testi-

mony is competent to show a consideration in addition to that expressed in the contract."

Windsor v. St. Paul etc. Ry. Co., 37 Wash. 156.

"But it is equally well established that matters which are independent of the contract may be proven by oral testimony. The trouble in each particular case is to determine whether the case falls within the general rule or within the exceptions of it."

37 Wash. 160.

"A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence."

Powelton Coal Co. v. McShain, 75 Pa. St. R. 238.

"When a promise is made by one in consideration of the execution of a writing by another, the promise may be shown by parol evidence."

Shughart v. Moore, 78 Pa. St. 469.

"A verbal promise at the making of a written contract, if made, to obtain its execution, may be given in evidence."

Graver v. Scott, 80 Pa. St. 88.

"The mere receipt of a bill of parcels or bill of lading, on payment of money or delivery of goods is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. *Such bills may or may not be the contract.*"

Bank of British N. America v. Cooper, 137 U. S. 477.

So here, anything that appears to be the last

document may not be the whole contract. *It nowhere says that it is.*

The records show that it was given without any written application, and without any new statements, and we assert that it is not only improbable but impossible that it was treated as a new bond when it was executed without any new application or any application whatever, but simply in pursuance of original applications, statements, etc. But none having been given or taken, certainly the omission is subject to explanation by parol.

“There may be instances in which a contract is partly in writing and partly oral and the two together constitute the contract, so there may be a question of fact as to whether the written agreement is or is not the entire agreement.”

Dennis v. Slyfield, 117 Fed. 474.

“Before this rule as to parol can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was what was the contract between the parties.”

Mobile & Mont. R. R. Co. v. Jurey, 111 U. S. 591.

“There is perhaps no rule of law which is more flexible or subject to a greater number of exceptions than the rule which in actions of law excludes parol evidence offered to vary or explain written documents. It has been said that in the multitude of exceptions much confusion has arisen, so that the exact limit to be placed upon the exceptions depends not only upon the peculiar facts of each case, but also to some extent upon the *peculiar cast of thought of the individuals composing the court*. *It may be stated generally,*

however, that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case."

17 Cyc. 638.

Lea v. Atlantic Fire Ins. Co., 84 S. E. 813.

"The general rule is that parol evidence is admissible to establish a fact collateral to a written instrument, which would control its effect and operation as a binding engagement."

Bartholomew v. Fell, 139 Pac. 1016.

To prove that the last continuing instrument was delivered to be effective April 1st, does not vary its terms because it became so by its terms. To prove that it was given in pursuance of the contract of insurance which had been in force for seven years does not in any sense change or vary the terms of the instrument. This would no more vary nor change its terms than to show that a promissory note was conditionally delivered and was to take effect only upon certain conditions.

That such evidence is proper and competent was expressly decided by the Supreme Court of the United States in *Burke v. Dulaney*, 153 U. S. 228.

"It has been held that parol evidence is admissible to apply the terms of the contract to the subject matter."

Stoops v. Smith, 97 Am. Dec. 76.

McFarland v. Sikes, 1 Am. St. Rep. 111.

We desire to prove what the real contract was.

We pray the opportunity to place before the jury the entire transaction with all the contracts

and all the facts and circumstances surrounding the parties.

We demand the right to put to the jury all the facts, and all the instruments and documents executed in connection with this transaction.

We urge that we are entitled to show the true intention of these parties as to this insurance.

We assert that we are entitled to establish that we had additional agreement with them in relation to the continuation.

We insist upon the right to prove the contemporaneous oral agreements made as an inducement, and that these constituted part of the consideration.

Miller v. Cas. Co., 193 Fed. 347.

“An oral contract of insurance, or an oral contract to issue a policy in future, is valid unless prohibited by statute.”

Richards on Insurance Law, p. 102.

“The statute of frauds is not applicable to a contract of insurance, re-insurance or renewal.” *Ibid.*

“It is often said that the doctrine of waiver and estoppel does not subvert the terms of the policy, and is not repugnant to the ordinary rules of evidence.” *Ibid*, p. 162.

“In most instances waiver or estoppel must be established by parol testimony.” *Ibid* p. 161.

“A company may make a valid renewal by parol even though the policy should stipulate that a renewal must be in writing.” *Ibid* p. 318.

“Though the contract is said to be avoided by the violation on the part of the insured of any of

the conditions or warranties inserted for the benefit of the insurer, this means that the contract is voidable at the option of the insurer. The insurer, therefore, may waive the forfeiture and revive the contract or he may estop himself from taking advantage of the breach." Ibid p. 154.

"Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defense to avoid payment."

Mutual Life Ins. Co. v. Hill, 193 U. S. 551.

LIMITATION.

"Limitations of the time of bringing suit in contracts of insurance are not to be applied with the same degree of rigidity as statutes of limitation."

75 Fed. 365.

"The bank having suspended business on November 12th, 1891, but the cashier having continued in the service of the receiver until March following, when he resigned, HELD, that the services so rendered by him after November 12th were rendered to the bank none the less because its affairs were controlled by a receiver and the surety company was not absolved from liability for acts discovered more than six months from November 12th, but within six months from his resignation."

American Surety Co. v. Pauly, 72 Fed. 470.
Syllabus.

"A provision in a fidelity bond indemnifying a bank against dishonesty of its cashier that it should be void if the bank failed to promptly notify the insurer in case any act of dishonesty came to its knowledge, did not become operative because the officers or directors of the bank learned of acts

of the cashier which were in fact dishonest if they were not known to be so at the time."

Syll. Aetna Indemnity Co. v. Farmers' Nat'l. Bank of Boyerton, Pa., 169 Fed. 738.

Roark v. City Trust etc. Co., 110 S. W. Rep. 1.

"Where the performance of conditions precedent are, without fault or laches on the part of the insured, rendered impossible by the acts of the insurer, or even by act of God or of the government or of the courts, such limitations are not to be applied. *Thompson v. Insurance Co.*, 136 U. S. 287; *Semmes v. Insurance Co.*, 13 Wall. 158."

75 Fed. 365.

"Although this form of insurance is of recent origin, it is now settled that the general rules of construction applicable to ordinary insurance policies are to be applied. *Mechanics' Sav. Bank v. Guarantee Co.*, 68 Fed. 459; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York*, 11 C. C. A. 96, 63 Fed. 48. *The condition of an insurance policy of this kind providing for forfeitures is to be construed strictly against the company, and liberally in favor of the insured. Cotten v. Casualty Co.*, 41 Fed. 506. Limitations of the time of bringing suit in contracts of insurance are not to be applied with the same degree of rigidity as statutes of limitation. *Steel v. Insurance Co.*, 2 C. C. A. 463, 51 Fed. 715; *Thompson v. Insurance Co.*, 136 U. S. 299, 10 Sup. Ct. 1019. See also, *May Ins. (2nd Ed.) Sec. 487*; 2 *Wood Ins. p. 1020.*"

Jackson v. Fid. & Cas. Co., 75 Fed. 365.

In the *Jackson case, supra*, a fidelity policy to a bank on its employe was involved, and the policy contained both the six months clause, and the one requiring a suit to be brought within a year. Neither

was complied with, and the Circuit Court of Appeals 5th Circuit, held, that under the circumstances the bond was not released.

“The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute, and we think the better rule is that the limitation, if reasonable—and there is no reasonable excuse for delay in the commencement of the action—is binding upon the parties * * * To determine whether limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together.”

Ilse v. Aetna Indemnity Co., 69 Wash. 484.

“In this case, while the action was not brought within six months after the work was completed, there was evidence to the effect that the suit was delayed at the request of counsel for the surety company. The court heard this evidence and no doubt believed that state of facts. It follows, of course, that where there was a delay at the request of the surety company or its representatives, it cannot be heard to say that the action was not brought within time. In other words, the court properly found upon sufficient evidence that there was a waiver of both these provisions of the contract by the surety company.”

Eilers Music House v. Hopkins, 73 Wash. 281.

The bank in the case at bar has not only pleaded that it was without laches or neglect, but that if this bond was not continued within the period required, it was wholly the fault and neglect of the Surety, and we are entitled to prove these facts just as they were proven in the *Jackson case*.

We believe the Honorable Trial Court wholly failed to grasp the purport of our pleading in this respect. He stated that the acts of the Surety which we pleaded, would constitute a different cause of action from the one we were pursuing, and that we should sue for a breach of the contract to renew the insurance.

“If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action.” (Tr. p. 118).

Bear in mind the Surety in its pleadings admits the execution and delivery of all the documents and the receipt of all the premiums. It then pleaded that no notice was given to it within six months after April 1st, 1913. (Tr. p. 47). It then pleaded that the execution of Exhibit “C” had been procured through misrepresentation (setting forth the misrepresentation) and that while it had been executed as of date April 1st, that it was actually executed on the 25th day of November. (Tr. pp. 48, 49).

It then pleaded that at the time of the execution of the bond and the various continuations, the bank agreed that it would from time to time make new and proper examination of the books to the end that any misconduct might be timely discovered. And then alleges that the bank failed to make the examinations as it had agreed to do. (Tr. p. 50).

In this connection we want to call attention to the fact that counsel for the surety in his argu-

ment to the court, laid much stress upon the point that it was essential that this six months forfeiture clause be enforced in order to compel these examinations to be made, and argued that if the examinations had been made according to agreement, the losses would have been discovered. The Honorable Trial Court seemed to assume that this matter of failure to examine was a fact established in the case. But there is not a word in the bond or any of the documents in the record about any examinations, and we denied that there was ever at any time any agreement that any examinations of this bank should be made, and there is nothing whatever in the record to show that examinations were not made.

The bank, replying to the above pleading, alleged that Exhibit "C" "was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance." (Tr. p. 53). "That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, * * * and for the consideration of the premiums paid and without any further or additional application having been made therefor." (Tr. p. 54).

"That there was a slight delay in the execution and delivery of said bond, but that said delay was caused by the neglect of defendant, and without

notice or knowledge on the part of plaintiff. That same was caused through no fault or neglect of plaintiff, but was caused wholly through the fault, carelessness and neglect of the defendant.” (Tr. p. 54).

Negligence, which the Trial Court seemed to think we could urge only as a different cause of action, was pleaded as against the Surety’s plea of delay in the execution of the renewal to show why it was executed in November but dated back to April 1st.

Certainly, if this matter of delay in the actual date of the execution of the continuation is material, we have the right to show that the delay was caused by the Surety, and not by the bank. Does not the very fact that Surety alleges that April first is not the true date, throw the whole transaction open to explanation?

The bank then further pleaded that while the Surety had full knowledge that all the officers of the bank were in Seattle, Washington, where its office was likewise located, did wrongfully, carelessly, negligently and knowingly take up the matter of continuing the bond with the “risk” Mitchell at Ketchikan, and did write to Mitchell and tender and offer to continue the insurance at the proper time and date. (Tr. pp. 54, 55).

Then further pleaded that as soon as the matter came to the attention of the bank, it took it up with the Surety and the Surety immediately recognized and admitted its oversight and neglect in the matter, and did voluntarily and forthwith

execute the instrument marked Exhibit "C" and made it operative from April first. (Tr. pp. 55, 56).

The bank therefore could not sue the Surety for failure to execute the extension, *because it did execute it*. It would be inconsistent for the bank to sue the Surety upon a breach of contract to continue when it has at all times alleged and now claims that the Surety did continue, and is therefore, in no position to take advantage of the six months forfeiture; that if there was a delay it was the delay of the surety, and therefore, it is estopped to claim the forfeiture. We are claiming that it was continued and that within a time and in a manner to fully avoid the forfeiture. Forfeitures are not favored.

Is not the pleading of the Surety in this case in the nature of confession and avoidance? It admits the execution and delivery of all the contracts but says it was defrauded. It admits the execution of the last continuance and that it provides for insurance from April 1st but says it was not actually executed until November. In other words, does it not all resolve itself into the question of whether or not the bank did, through misrepresentation, procure this last continuation?

When we stated in argument that we had authority to the point that the bond, although dated back, would take effect from its date, the Trial Court interrupted, saying, there could be no doubt about that, and of course, there is no doubt about

it. The Surety asserts that on the date of the actual execution of the continuation more than six months had already elapsed. If true, *it knew that fact at the time as well as the bank*. It not only must be held to have known it, because it was its own transaction, but the fact that it dated the renewal back to April 1st, proves conclusively that it not only knew it, but that it took it into consideration at the time and was willing to waive it. When the Surety, with the facts before it, made this contract effective from April 1st, it absolutely waived the six months forfeiture. It became, and is estopped to assert that the six months had already expired and that it is therefore entitled to the forfeiture.

Could there be a doubt of the right of the Surety and the bank on the 25th day of November, to have agreed to waive forfeiture if any existed and to continue the insurance uninterrupted? What evidence is there that such was not done. You will search in vain for such evidence in the instrument.

The Surety is here in this case pleading and asserting the right to show by parol evidence what the contract was at the time it executed the last instrument, and it having executed and delivered the instrument, and accepted the premium, the burden of proof is upon it to show that it is not what it seems.

May not the bank then have an equal right to show what the contract at that time actually was? The Surety was the first to plead that this instru-

ment was not what it purported to be, and was not the *real* contract. Is it not thereby estopped from saying that the bank may not show what was the real contract?

“A policy insuring against loss through dishonesty of an employe provided that as soon as any act of omission or commission of the employe should come to the knowledge of the employer, the latter should notify insurer. On October 12th, the employer wrote to the agent of the insurer and to the insurer, notifying them that the employe had absconded on September 26th, preceding, leaving a shortage of a specified amount. On the following day the agent of the insurer acknowledged receipt of the notice and requested the employer to send other information he might obtain. The correspondence between the parties, extending until April following, showed that the insurer only desired to know the amount of the liability. HELD, to show a waiver of any insufficiency in time of the notice of loss.”

Syll. Roark v. City Trust, etc., Co., 110 S. W. Rep. 1.

“Waiver may be inferred from acts as well as words.”

Pac. Mutual Life Ins. Co. v. McDowell, 141 Pac. 273.

This whole question on this branch of the case is one of the right of Surety to enforce a forfeiture.

“It being apparent that the bond sued on was prepared by the defendant, as to any ambiguity therein the provisions, conditions and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract. *French v. Fidelity & Casualty*

Co., 135 Wis. 259; *American Surety Co. v. Pauly*, 170 U. S. 133.”

United Am. Fire Ins. Co. v. Am. Bonding Co., 131 N. W. 994.

“We think the two provisos referred to should be held to be conditions subsequent, which the defendant must plead and prove as part of its defense, if it relies on them to defeat the plaintiff’s cause of action. *Redman v. Ins. Co.*, 49 Wis. 431, 4 N. W. 591; *Johnson v. Ins. Co.*, 94 Wis. 117, 68 N. W. 868.” *Ibid.*

“In no other branch of fidelity insurance law has the ‘doctrine of waiver’ a wider or more important bearing than with reference to the subject of conditions and alleged breaches thereof. For no matter how great may have been the violation of the conditions on the part of the insured the right to avoid the policy by reason thereof may be waived by the insurer either directly or indirectly. * * * The question whether or not a breach of the condition of a policy has been waived or not, is ordinarily a question for the jury. *There is no necessity that the waiver should be in writing.*”

Law of Guaranty Ins., Frosts’ 2nd Ed., p. 261.

Rice v. Fidelity & Dep. Co., 103 Fed. 427.

American Surety Co. v. Pauly, 72 Fed. 470.

Aetna Indemnity Co. v. Farmers’ Nat’l. Bank, 169 Fed. 738.

“Where an application for fire insurance is made and the terms thereof are agreed on between the insurer’s authorized agent and the insured, and it is agreed that a policy embodying such terms shall be issued, the agreement is complete though credit be extended for the premium, and, where a policy is subsequently issued, it relates back to the time specified for the insurance to begin.”

Roark v. City Trust etc. Co., 110 S. W. Rep. 1.

"In an action on a bond to make good loss by embezzlement of an employe, a plea seeking to avoid the bond as procured by misrepresentations as to the previous state of his accounts by the employer, averred that the employe was then a defaulter and that the employer knew it, or could have known it by the exercise of diligence. Held, that this was bad, as a double plea."

Supreme Council Cath. Knights of Am. v. Fid. & Cas. Co., 63 Fed. 49.

"While liability under a surety bond for honesty of an employe would be defeated if the loss was due to neglect of the employer to take the precautions required by the bond, the condition is subsequent and not precedent, and there is no occasion for an averment in respect thereto; it is a matter of defense that must come from the other side, upon whom the onus rests. * * *

"The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered by false entries and bookkeeping devices, would not defeat renewals of the policy."

Title Guaranty & Surety Co. v. Nichols,
224 U. S. 346.

"It is urged by counsel for plaintiff in error that the promises and agreements on the part of the insured to exercise and maintain over the employe such a supervision as contemplated in his bond of indemnity was not observed; hence, there has been a breach of the bond on the part of the insured. Unless there was a substantial compliance with these undertakings, the conclusion urged by counsel would probably be true. However, in such breach the burden of proof would rest on the insurer. *United States Fidelity Co. v. First Nat. Bank*, 233 Ill. 475, 84 N. E. 670; *Perpetual B. & L. Soc. v. U. S. Fid. & Guar. Co.*, 118 Iowa 729, 92 N. W. 687; *Bank of Tarboro v. Fidelity & Dep. Co.*,

128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *T. M. Sinclair & Co. v. National Surety Co.*, 132 Iowa 549, 107 N. W. 184; *Jones v. Accident Asso.*, 92 Iowa 658, 61 N. W. 485."

Southern Surety v. Tyler & Simpson, 120 Pac. 938.

In the light of this authority we again challenge the attention of the Court to the fact that there is nothing in any of the contracts here requiring examinations. Since so much has been made of that point as a reason for enforcing the forfeiture, we cite these authorities upon the point that it is in no event a condition precedent, if they should prove the facts which they have alleged at the trial, and would not therefore justify the forfeiture.

"The insured under a fidelity bond is not required to aid the insurer in determining the desirability of the contract of indemnity, nor to warn him against risk where all the facts are as accessible to the one as to the other, whether the insurer be present or absent, unless the circumstances of the case are such that silence on the part of the insured would amount to an intentional deception or fraud. *Sherman v. Harbin*, 100 S. W. 629."

Law of Guaranty, Frost, p. 307.

"If it had desired a more frequent examination, it had the power to require the same; but, having continued its bond from time to time upon said representations and for the consideration paid by the bank, it is now estopped to deny liability on the ground that the examinations were made, at periods more extended than originally contemplated."

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 615.

"Where a surety company has continued in force, from year to year, its bond indemnifying a bank against pecuniary loss by reason of the dishonesty of its cashier, upon representation by the Bank that the books and accounts of such cashier were examined from time to time in the regular course of business and found correct, such surety company is estopped to deny liability by reason of the fact that such examinations were made at periods more extended than those provided for in the original application for the bond." Ibid.

"Mere negligence on the part of the obligee in failing to discover the defaults of the employed will not release the surety. It does not in any case apply to mere breaches of duty or of contract obligations on the part of the employed, not involving dishonesty on his part or fraudulent concealment on the part of the insured."

Frost's 2nd Edition, p. 183.

"It appears that the cashier, Strong, *successfully secreted his defalcations from these men, notwithstanding the fact that they made a reasonably diligent investigation from month to month. The fact that he did succeed in thus hiding his wrongdoing for a time does not demonstrate that the members of the committee failed to perform their duty. If that process of reasoning should be followed out, it would necessarily defeat the objects of the bond. It was from just such a condition of affairs that the bank sought indemnity. As has been well said 'an employer would need no insurance against that close and relentless vigilance which makes stealing impossible.'* Hammond, J., in *Guarantee Co. v. Mechanics' Bank*, 80 Fed. 766, 26 C. C. A. 146."

American Bond Co. v. Morrow, 117 Am. St. Rep. 76, 77.

"The business honesty or fidelity insured by such contracts as these is not that kind of enforced

honesty which comes of a want of opportunity to be dishonest, but that which is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and in the absence of evidence to the contrary, presumably that which is bargained for in each instance; a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, *perhaps indulged because of reliance upon the insurance which he has accepted as a protection.*”

Guarantee Co. v. Mechanics' Sav. Bank, 80 Fed. 766.

“It is that which the obligee would naturally seek for his protection, always desiring presumably, to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implicit or general limitations upon the guarantee against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness.” *Ibid.*

“Up to that time in this, as in other cases of a like nature, the employe had concealed his embezzlements, and the fact that the bank officials did not immediately discover that the institution was being robbed is not a fact, in itself, sufficient upon which to predicate the contention that they failed in the performance of their duty in examining his books and accounts, amounting to a breach of their alleged warranty in this regard.”

U. S. Fid. & Guar. Co. v. Boley Bank, 144 Pac. 617.

"It is pertinent to remark that if the bank was left under an active duty of vigilance as to supervision of habits or inspection of accounts with a view to prevent fraud, there would be little or no motive to secure and pay for insurance like this."

Mechanics' Sav. & Trust Co. v. Guarantee Co., 68 Fed. 465.

"It is true that the bank could have discovered Phillips' shortage if it had checked up the books of the bank with that object in view; but the suspicions of the officers of the bank had never been aroused."

Fid. & Dep. Co. v. Guthrie Nat'l. Bank, 17 Okla. 397.

"Comparatively few human transactions would stand an after-event test."

Mechanics' Sav. & Trust Co. v. Guarantee Co., 68 Fed. 466.

"It is not probable that any examination the bank would have caused to be made would prove satisfactory as looked at after the facts are all known, unless the same had detected Schardt." *Ibid.*

"It is not difficult after a disaster has occurred to look back and criticize freely." *Ibid.*

"The object of an indemnity bond is to indemnify, and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose and becomes worse than useless. It is worthless as actual security and misleading as a pretended one. *Bank of Tarboro v. Fidelity & Dep. Co. of Md.*, 128 N. C. 366, 83 Am. St. Rep. 682."

Southern Surety Co. v. Tyler & Simpson, 120 Pac. 939.

In *Phoenix Insurance Co. of Brooklyn v. Guarantee Co. of N. America*, 115 Fed. 964, the Circuit Court of Appeals, in considering one of these bonds where a forfeiture was claimed, said that the bank was not required to employ somebody to watch its cashier all the time, and said, "if it had undertaken to do this, it would not have needed a bond of indemnity."

"Certificate made upon renewal of a bond that books were examined and found correct is not a warranty."

Hunter v. U. S. Fid. & Guar. Co., 167 S. W. 693.

That was an action against this same company, upon this same bond, in which the same defense was set up in an effort to defeat the bond. See also, 224 U. S. 353.

"It is now well settled that the bond of the surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and when doubtful or ambiguous, must be given the strongest interpretation against the insurer, which it will reasonably bear."

Amer. Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72.

"In an action against the maker of a bond given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the

former, if consistent with the objects for which the bond was given, must be adopted."

Syllabus. *Amer. Surety Co. v. Pauly*, 170 U. S. 133.

See also:

Champion Ice Mfg. Co. v. Am. Bond. & Tr. Co., 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356.

Title Guaranty & Sur. Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537.

Bank of Tarboro v. Fid. & D. Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

French v Fid. & Cas. Co., 135 Wis. 259, 265, 115 N. W. 869.

Redman v. Ins. Co., 49 Wis. 431, 435, 439; 4 N. W. 591.

Johnson v. Ins. Co., 94 Wis. 117, 119; 68 N. W. 868.

Roark v. City Tr. Safe Dep. & Sur. Co., 110 S. W. Rep. 1.

" "There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank:' *Travelers' Insurance Company v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. ed. 308; *First National Bank v. Hartford Fire Ins. Co.*, 95 U. S.

673, 24 L. ed. 563; *Reynolds v. Commerce Fire Insurance Co.*, 47 N. Y. 600; *Bank of Tarboro v. Fidelity & Dep. Co. of Md.*, 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *Champion Ice Mfg. & C. S. Co. v. Amer. B. & Tr. Co.*, 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356; *Remington v. Fidelity & Dep. Co. of Md.*, 27 Wash. 429, 67 Pac. 989; *U. S. Fidelity & G. Co. v. First Nat. Bank*, 233 Ill. 475, 84 N. E. 670; *American Bonding Co. v. Spokane Bldg. & L. Soc.*, 130 Fed. 737, 65 C. C. A. 121; *Aetna Indemnity Co. v. Crowe Coal & Mining Co.*, 154 Fed. 545, 83 C. C. A. 121; *Livingston et al. v. Fidelity & Dep. Co. of Md.*, 76 Ohio St. 253; 81 N. E. 330; *Guthrie Nat. Bank v. Fidelity & Dep. Co. of Md.*, 14 Okla. 636, 79 Pac. 102, Id. 17 Okla. 397, 87 Pac. 300."

Southern Surety Co. v. Tyler & Simpson Co., 120 Pac. 938.

See also:

Mechanics' Sav. Bank & Tr. Co. v. Guaranty Co., 68 Fed. 462.

Aetna Indemnity Co. v. Crowe Coal & Min. Co., 154 Fed. 555.

Cowles v. U. S. Fid. & Guaranty Co., 32 Wash. 120.

"It seldom occurs that embezzlement or larceny is detected within three, six or twelve months after committed, especially if the employe has been in the service of his employer for some time and is trusted by him, and is shrewd."

U. S. F. & G. Co. v. Bank of Monticello, 143 S. W. p. 998.

We pleaded and stated to the jury that the business of this bank was to be transacted at Ketchikan, Alaska, six hundred miles away from Seattle, the home office of the bank, and that the Surety

at all times had knowledge of this fact; that it wrote the bond knowing these facts, and knew just how the business was to be conducted, and the Surety at all times knew that to make such examinations as it now contends should have been made, was impracticable and impossible, and that it would be unreasonable to expect that any such examinations as it now alleges, could or would have been made. That the Surety, well knowing and understanding all of the above and foregoing facts and conditions, and the manner in which the business was to be conducted, did write and deliver such bond and continuations, and accept the premiums therefor, etc. (Tr. pp. 56, 57).

“But however this may be, the object of the contract being to afford an indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it * * * *Bray v. Insurance Co.*, 139 N. C. 390, 51 S. E. 922; *Railroad Co. v. Casualty Co.*, 145 N. C. 116, 58 S. E. 906; 19 Cyc. 655; *W. F. Ins. Co. v. Simons*, 96 Pa. 520; *Rogers v. Aetna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396; *Insurance Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. ed. 460; *F. C. Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *S. F. & M. Insurance Co. v. Wade*, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870; *Vance on Insurance*, p. 429.”

Crowell v. Maryland Motor Car Ins. Co.,
85 S. E. 37.

“The defendant’s expert evidence tended to show that if the returned vouchers or the reconciliation reports of such banks had been compared with the ledger accounts, the discrepancy would have

appeared. But the cashier was cunning, and he testified to the difficulties which he threw in the way of any effort to verify the books in these particulars."

Surety Co. v. Nichols, 224 U. S. 352.

"It is said that this statement was untrue, inasmuch as at the date of such renewals the books and accounts were not correct and the cashier was short in his cash. But the certificate is not to be taken as a warranty of the correctness of the accounts. The statement is that his books and accounts had been examined and found correct. The mere fact that the examination, if made by a reasonably competent person, failed to discover discrepancies covered up by false entries, or other bookkeeping devices, *would not defeat the renewal.*" Ibid. 353.

"The question of the weight or credibility of the evidence is not one for our consideration. There was some evidence which the trial judge thought sufficient to carry the case to the jury." Ibid.

The bank's duty under these several contracts in this case was confined to the observance of good faith and fair dealing, and *the burden of proving to the contrary was upon the Surety.*

"At the time appellant issued this insurance it knew that the bank was what is called 'a country bank,' and that the officers of it were men who probably could not give the accounts an expert examination."

U. S. Fid. & Guar. Co. v. Citizens National Bank, 143 S. W. 999.

"Who are referred to in the brief as 'ignorant and incompetent negroes,' it may be said that they were the persons with whom defendant contracted in the first instance, and it must be charged with

a knowledge of their race, their intelligence and business capacity. The fact is notorious that Boley is a negro town in which no white man has ever lived, or desired to live."

U. S. Fid. & Guar. Co. v. Boley Bank, 144
Pac. 615.

So in this case, the same company is charged with knowledge that the bank was located at a great distance, in a sparsely settled community, where experts are not available and no officer of bank was there to watch or check Mitchell; that Mitchell would be in absolute and sole charge and control, and with the further fact that no special examinations were at any time promised or guaranteed, and without having requested any special examinations, it continued to extend the insurance and accept the premiums, and at the time of renewals, did not even take an application, nor ask for information.

"It was upon these certificates that the bond *was renewed and continued in force.* * * * If it had desired a more frequent examination, it had the power to require the same."

U. S. Fid. & Guar. Co. v. Boley Bank, 144
Pac. 617.

"The person insured in a policy of fidelity insurance is not, perhaps, held strictly to the duty of disclosing all conditions material to the risk, as in the case of ordinary insurance, because the insured and the insurer stand upon a plane of equal opportunity for information."

Am. St. Rep. Vol. 100, p. 780.

"Insurer and insured in a fidelity insurance bond, being upon a plane of equal opportunity

for information, the insured is not held strictly to the duty of disclosing all the conditions material to the risk, as in the case of ordinary insurance."

Guarantee Co. of N. A. v. Mechanics' etc.,
80 Fed. 767.

"It has been claimed frequently, and sustained by courts of acknowledged eminence, that in respect to such matters as are here being considered the insurer and the insured stand upon a plane of equal opportunity for information."

Law of Guaranty Insurance, Frost's 2nd
Ed., p. 280.

"In short, if we give the alleged warranties the scope which the defendant claims should be given to them, no bond of indemnity would ever be taken out by an employer."

Southern Surety Co. v. Tyler & Simpson Co., 120 Pac. 939.

"An insurance contract will be construed to avoid a suspension of liability or a forfeiture and to sustain rather than defeat its purpose, when that can be done without violence to the language employed."

Mathews Farmers' Mutual v. Moore, 108 N. E. 155.

We assert with confidence that, under the above decisions the bank would have the right to show that it was not guilty of any negligence or laches in not making discovery within the six months, and that therefore the company may not claim this forfeiture, even though the last continuation has never been issued.

In the case of *United States Fid. & Guar. Co.*

v. Citizens National Bank of Monticello, 143 S. W. 997, the continuation certificates were the same which the company used in this case.

The language in the bond as to renewals and continuations is exactly the same, it being the same company.

In that case the original written application contained the following:

“And I hereby agree for myself, my heirs and administrators, in consideration of the United States Fidelity & Guaranty Company becoming Surety for me, and issuing the bond of security hereby applied for, *or any renewal thereof, or any further or other bond of security hereby issued by the said company on my behalf,*” etc.

In that case in the employer's statement following the application, is the following language:

“It is agreed that the above answers are to be taken as a basis for the said bond applied for, *or any renewal or continuation of the same* that may be issued by the United States Fidelity & Guaranty Company to the undersigned, upon the person above named.”

Since this is the same company, the same bond, and the same continuation certificate, it is only natural to assume that the same statements are contained in the written application and the employer's statement. As we have pointed out, the bond recites that a written application has been given, and that an employer's statement has been taken, and before the court can, as a matter of law, say that the provisions of this written application and of the employer's statement do not jus-

tify and prove our contention that it is a continuous contract, it must have before it *all of the contract*, and these can only be brought into the record by introducing them in evidence at a trial, which we humbly pray this court to give us.

We have quoted above the renewal certificate in the *De Jernette Case*. In that case they were called "renewal certificates." In the case at bar the contracts issued from year to year are not called "renewal certificates," but are in the contracts themselves denominated "continuation certificates." (Tr. p. 28). The designation being "Continuation Certificate No. T-450." "Continuation" is much stronger than "renewal." The word "renewal" may be construed to signify to make new again. That is, to free from the requirements and limitations attached to that whose place it takes. On the other hand, the word "continuation" implies continuity of existence. When the Surety, by means of "continuation certificate," continued in force the bond, it continued in existence and prolonged the life of that bond.

It was a part of the scheme to advertise on the part of this company, that it was offering to the bank in soliciting its business, a CONTINUING POLICY. This form of continuous insurance has become popular, and its superiority is emphasized by experience. Employes of banks are usually expert bookkeepers and accountants, and if they set their heads to steal, they can do so in spite of the most vigilant watching, and in a majority

of cases, detection occurs only after the stealing has been going on for a period of time. Frequently, for a term of years, and it is usually discovered because the thief eventually grows somewhat confident and careless, or because he goes on a vacation, or some unexpected event throws light into a hidden nook or cranny.

Because of this fact, and of the difficulty and delay in detection of such employes, employers do not want short-lived policies, and so the system of continuation of the insurance contract developed, and consequently, the insurance companies in their keen competition for business with an educated and discriminating insuring public, advertised and emphasized this feature of continuing insurance. And, undoubtedly catering to this wish and demand on the part of the banking world, the last continuation in this case is made without limitation, and is to continue in force until terminated by notice.

Look again at the "continuation certificate." (Tr. p. 28). At the close it reads: "Subject to all the covenants and conditions of said original bond heretofore issued, *dating from* the 1st day of April, 1906." The particular certificate copied was dated April 1st, 1910, but note the insurance dates from April 1st, 1906, and it so states in this continuation certificate. This language is in each of the continuation certificates. It is, therefore, very clearly shown from the certificates that it was intended that the continuing guaranty should run *from* the date of the original bond, April 1st, 1906,

and cover the entire period of time from that date until the end of the period for which such continuation certificate is issued, and it seems equally clear, taking all the papers together, that it was the intention and expectation of both parties that the continuation certificates issued from year to year would continue the bond in force so as to cover any loss that might accrue during the entire period, as though the bond itself had so specifically provided.

This is the only reasonable construction, as the continued liability remains the same in dollars and cents, while if each year is to be taken as a new and independent contract, then the full penalty of the bond, if necessary, would stand to indemnify any loss for each year, and if \$25,000 were stolen during each year, it would thus become cumulative, and the company might become liable for five times the bond penalty, if there had been a \$25,000 stealing in each of the five years. Certainly the company does not want that construction placed upon its continuing contracts of insurance.

The fact that while such contracts were undergoing judicial construction, the company adopted the plan of continuing without restriction its contracts, and the further fact that it issued continuations instead of the old "renewal contracts," shows an evident intention of making change in the character of its contracts, and the change intended to be made could be no other than that from the system of restricted renewals which the courts had con-

strued into a separate and independent contract for each year, into a CONTINUING GUARANTY, to run so long as the insured was willing to pay the premium, and as it should determine to accept the same.

The renewal receipt in the *De Jernette case*, and the continuations in this case are so radically different that there can be no kinship in the principle governing their construction.

“When a bond guaranteeing the fidelity of an employe is renewed, there is still only one contract and one penalty, the renewal certificate being a new bond only in extending the indemnity provided by the original bond to a new period of time.”

First National v. U. S. Fid. & Guar. Co.,
110 Tenn. 10.

We respectfully submit the cause should be reversed and remanded.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
WILLIAM H. METSON,
Attorneys for Plaintiff in Error.

METSON DREW and MACKENZIE,
of Counsel.

No. 2626

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MINERS' & MERCHANTS' BANK, a corporation,
Plaintiff in Error,
vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

BRIEF OF DEFENDANT IN ERROR.

HENRY F. McCLURE,
W. T. DOVELL,
Attorneys for Defendant in Error.

McCLURE & McCLURE,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Of Counsel.

Seattle, King Co., Wash.

Filed
LOWMAN & MANFORD CO., SEATTLE

OCT 15 1915

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vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation,
Defendant in Error.

**Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.**

BRIEF OF DEFENDANT IN ERROR.

Inasmuch as the presentation made by the plaintiff in error is somewhat discursive, we shall state the facts as follows:

The plaintiff in error had been insured under a policy which reads as follows:

(Cover)

**THE
UNITED STATES FIDELITY
AND GUARANTY COMPANY.**

FIDELITY BOND

No.

In Behalf of
MACK A. MITCHELL
to
MINERS' & MERCHANTS' BANK,
Ketchikan, Ala.
Date, April 1st, 1906.
Expired, April 1st, 1907.

CALHOUN, DENNY & EWING,
DISTRICT AGENTS
Seattle, Wash.

Form O.S. 1 M-9-7-03.

CAPITAL PAID IN CASH, \$1,700,000.

Amount, \$25,000.00.

Annual Premium, \$100.00.

Bond No. 450.

No. 5764.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY
Home Office,
Baltimore, Md.

WHEREAS, MINERS' & MERCHANTS' BANK, KETCHIKAN, ALASKA, hereinafter called "The Employer", is employing or intends to employ MACK A. MITCHELL in the capacity of CASHIER, hereinafter called "The Employee," and has filed with THE UNITED STATES FIDELITY AND GUARANTY COMPANY, hereinafter called "The Company," an application specifying the amount of security required from said Employee, and has applied to the Company for the grant of this bond; and

WHEREAS, the Company in consideration of the sum of one hundred and 00/100 dollars, now paid as a premium from April 1st, 1906, to April 1st, 1907, at 12 o'clock noon, has agreed upon the terms, provisions and conditions herein contained to issue this bond to the Employer; and

WHEREAS, the Employer has heretofore delivered to the Company certain representations and promises relative to the duties and accounts of the Employe and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer, hereafter required by or lodged with the Company, are hereby expressly warranted to be true.

NOW, THEREFORE, THIS BOND, WITNESSETH, that for the consideration of the premises, the Company shall, during the term above mentioned, or any subsequent renewal of such term and subject to the conditions and provisions herein contained, at the expiration of three months next, after proof, satisfactory to the Company, as hereinafter mentioned, make good and reimburse to the said Employer, such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employe in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employe from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account of said Employe under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND (\$25,000) DOLLARS.

PROVIDED, That on the discovery of any act capable of giving rise to a claim hereunder, the Employer shall, at the earliest practical moment, give notice thereof to the Company, and any claim made under this Bond shall be in writing addressed to the Company at its head office in the City of Baltimore; and shall within three months after the discovery thereof, at the Employer's expense, furnish to the Company reasonable particulars and proofs of the correctness of said claim, and such particulars, if required, shall be verified by affidavit.

PROVIDED FURTHER, That the Company shall not be liable, by virtue of this Bond, for any act or thing done or left undone by the Employe in obedience to, or in pursuance of an instruction or authorization received by him from the Employer or any superior officer, or for any mere error of judgment or bona fide mistake, or any injudicious exercise of discretion on the part of the Employe, in and about all or any matters wherein he shall have been vested with discretion either by instruction or by the rules and regulations of the Employer.

PROVIDED FURTHER, That the Company shall not be liable under this Bond for the amount of any balance that may be found due the Employer from the Employe, and which may have accrued prior to the date hereof, it being the true intent and meaning of this Bond that the Company shall be responsible as aforesaid for moneys, securities, or property diverted from the Employer within the period specified in this Bond.

AND PROVIDED, ALSO, That this Bond is granted upon the express understanding or agreement that as against every corporation or person now being or hereafter becoming security or surety and upon every security held by the Employer for the Employe in his employment as aforesaid, the Company shall have and possess the right of ratable contribution and all other

rights and remedies, both legal and equitable, of co-sureties.

AND ALSO, That, should the Employe become guilty of an offence covered by this Bond, the Employer will immediately, on being requested by the surety to do so, lay information before a proper officer covering the facts and verify the same as required by law and furnish the Company every aid and assistance, not pecuniary, capable of being rendered by the Employer, his or its agents and servants, which will aid in bringing the Employe promptly to justice, and such action when required of the Employer shall be a condition precedent to recover under this Bond.

PROVIDED, That the Company shall have the right, upon giving thirty days' notice in writing to the Employer, to cancel this Bond at the expiration of said thirty days; and if the bond shall be so cancelled, the Company shall refund the proportion of the premium for the unexpired term of risk.

PROVIDED, That the Employe may perform other duties than those properly belonging to the position mentioned in this Bond without notice of such change being given to the Company.

PROVIDED, That the premium due the Company for becoming surety for the Employe named in this Bond shall be paid within thirty days after the delivery hereof, and if not so paid, this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

AND PROVIDED, LASTLY, That this Bond is also subject to the following conditions:

THAT, any misstatement or suppression of fact in any claim made hereunder renders this Bond void from the beginning.

THIS BOND will become void as to any claim for which the Company would otherwise be liable, if

the employer shall fail to notify the Company of the occurrence of the act or commission out of which said claim shall arise immediately after it shall come to the knowledge of the Employer; and the knowledge of a President, Vice-President, Director, Secretary, Treasurer, Manager, Cashier or other like executive officer shall be deemed under this contract the knowledge of the Employer. And upon the making of any claim hereunder, this Bond shall wholly cease and determine as regards any act or omission of the Employe, committed subsequent to the making of such claim, and it shall be surrendered to the Company on the payment of such claim.

THAT, after the expiration of the Company's liability hereunder, and no claim having been presented the then unexpired portion, if any, of the term for which this bond was granted, shall apply to any new Employe whose risk, to the same amount, the said Company may at that time assume or the Company shall at the election of the Employer return to the Employer the unearned premium on return of this Bond for cancellation.

IT IS FURTHER MADE AN EXPRESS CONDITION of this Bond that no suit or action of any kind against the Company for the recovery of any claim upon, under or by virtue of this Bond, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced, and the process served on the Company within the term of twelve months next after the date of filing notice of a claim therefor as hereinbefore provided; in case any suit or action shall be commenced against the Company after the expiration of said period of twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

THAT no one of the above conditions, or of the provisions contained in this Bond, shall be

deemed to have been waived by or on behalf of the Company, unless the waiver be clearly expressed in writing over the signature of its President and Secretary, and its seal thereto affixed.

THAT the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employee, and upon the issuance of any Bond subsequent hereto upon said Employee in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

AND THE EMPLOYEE doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the Company that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expense, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this Bond, and without notice to him thereof) or for, or by reason or in consequence of, the Company having entered into the present Bond.

IN WITNESS WHEREOF, the said MACK A. MITCHELL (the Employee) has hereunto set his hand and seal, and the Company has caused this Bond to be sealed with its corporate seal, duly attested by the signatures of its Attorneys in Fact, this 1st day of May, one thousand nine hundred and six.

Signed, sealed and delivered by the Employee
at.....

.....L. S.

In the presence of

THE UNITED STATES FIDELITY AND	
GUARANTY COMPANY,	
A. KENNARD,	DOUGLAS R. TATE,
Attorney-in-Fact.	Attorney-in-Fact.

This policy was continued in force by virtue of renewal certificates issued each year, the last renewal certificate being issued April 1, 1912, so that the policy was in force until April 1, 1913.

On April 1, 1913, the insurance terminated, save that under the terms thereof the insurer would be liable for any loss discovered within six months after the termination of said policy. From that time until November 25, 1913, the plaintiff in error had no policy.

On the last named date the plaintiff in error secured from the defendant in error another policy of insurance, which reads as follows:

UNITED STATES FIDELITY & GUARANTY
COMPANY.

Capital Paid in Cash, \$2,000,000.

Total Resources Over \$7,400,000.

Home Office:
Baltimore, Md.

No. 27999.	\$25,000.00
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The UNITED STATES FIDELITY AND GUARANTY COMPANY, as Insurer, for a premium of SIXTY-Two and 50/100 (\$62.50) DOLLARS, hereby guarantees to pay to the MINERS & MERCHANTS BANK OF KETCHIKAN, ALASKA, the Employer, such pecuniary loss as the Employer shall sustain (limited only by the provisos hereof) of money,

bonds, debentures, scrips, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, currency, merchandise or other property, including that for which Employer is responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act by MACK A. MITCHELL, directly or through connivance in any position and at any location in the Employer's employ, and during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS until the termination of this insurance.

PROVISOS:

1. In the event of the recovery of any loss, or portion thereof, from other than insurance, the Employer shall be entitled thereto until fully reimbursed, the excess, if any, to be paid to the Insurer.

2. The Employer shall deliver notice of any default hereof to the Insurer at its Home Office within ten (10) days after the discovery of such default. All claims shall be submitted, showing the items and dates of the losses, and delivered in writing to the Insurer at its Home Office within three (3) months after their discovery. The Insurer shall have two (2) months after claim has been presented in which to verify and pay the same, during which time no legal proceeding shall be brought against the Insurer as to that claim, nor at all as to that claim after the expiration of twelve (12) months from its date.

3. This insurance shall only terminate by:

(1) The Employer giving notice in writing to the Insurer specifying the date of termination.

(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases.)

(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

4. The discovery of any loss through the Employee.

IN TESTIMONY WHEREOF, THE UNITED STATES FIDELITY AND GUARANTY COMPANY has hereunto set its seal. Witness the hand of its Attorney-in-Fact, on this 1st day of April, 1913.

UNITED STATES FIDELITY AND
GUARANTY COMPANY

By C. H. CAMPBELL,

Attorney-in-Fact.

(Seal.)

This last policy was, at the request of the plaintiff in error, dated back to the first day of April, 1913.

Promptly upon the securing of this last policy the plaintiff in error discovered its loss.

As nearly as we can understand the contention of plaintiff in error, it is that this last policy dated back to April 1, 1913, operates as a renewal or a continuance of the old policy, so that we are to be held liable for losses under the old and lapsed policies.

The design of the plaintiff in error in securing this last policy from us is palpable, and it would seem a strange perversion of legal principles if it is permitted to accomplish this design. Surely it will not escape the attention of the Court that the sole purpose of the plaintiff in error in securing this last policy was to endeavor to tie it to the old policy, and thus fix a liability for losses which had occurred during the term of the policies which had lapsed.

You will notice the difference between the old lapsed policies and the new one. In the old policies

the insurer was liable for "such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employe in connection with the duties of his office or position, *amounting to embezzlement or larceny.*" By the policy issued in November, 1913, the insurer is made liable for "such pecuniary loss * * * occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation."

We contend that the contract of insurance is clear. It provides that we shall be liable for any loss sustained by the employer during the term of the policy and which shall have been discovered during the term thereof or within six months thereafter. The policy was continued from year to year after 1906 until April 1, 1913, when the policy lapsed. No discovery of any loss was made until more than six months after the lapse of the policy.

It is our contention that on April 1, 1913, the old policy had lapsed and on October 1, 1913 (being six months after the termination of the old policy), no loss having meanwhile been discovered, all liability ceased, and that the policy issued November 25, 1913, and dated back to April 1, 1913, was a new policy and not a renewal.

It would seem that argument is unnecessary to establish that the policy issued in November, 1913, is a new policy and not a renewal of the old. *Every term and provision of the new policy is different from the old.* The old policy held us liable only for such

pecuniary loss as the employer might sustain by reason of the acts of the employe, amounting to embezzlement or larceny. The new policy issued November 25, 1913, held us responsible for any acts of fraud, dishonesty, etc.

Judge Neterer, in the court below, had this clearly in mind when he said (Tr., p. 117):

“ ‘Here are two bonds. One bond contains such rights and such obligations. Now, here is another bond. This contains broader obligations and rights.’ Now, under which bond would it come? It would not come under both. If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one. I couldn’t instruct the jury under that, because it is a renewal.”

The Court can not close its eyes to the palpable intention of the plaintiff in error in securing the new form of bond. When in November, 1913, it claimed to have learned that the bond which expired April, 1913, had not been renewed, it did not apply to the surety company for a continuation certificate such as had been issued from year to year, in the form which is set forth on page 28 of the transcript, which would have continued or renewed the old form of policy, but instead applied for a new form of bond.

From a reading of the description of the acts of Mr. Mitchell set forth in the statement of counsel, printed in full in the transcript, it is quite clear that such acts would not constitute embezzlement or larceny under the common law or the Alaska statute.

Larceny is defined as follows (see *Compiled Laws of Alaska* (1913), § 1921) :

“That if any person shall steal any goods or chattels, or any Government note, or bank note, promissory note, or bill of exchange, bond, or other thing in action, or any book of accounts, order, or certificate, concerning money or goods, due or to become due or to be delivered, or any deed or writing containing a conveyance of land or any interest therein, or any bill of sale, or writing containing a conveyance of goods or chattels or any interest therein, or any other valuable contract in force, or any receipt, release, or defeasance, or any writ, process, or public record, the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value thirty-five dollars, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of thirty-five dollars, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars.”

An accepted common law definition of larceny is:

“* * * the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein.”

See 2 *Bishop on Criminal Law*, 7th Ed., § 758.

Embezzlement is defined by the Alaska Code as follows:

“That if any officer, agent, clerk, employee, or servant of any private person or persons, co-

partnership, or incorporation shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle or fraudulently convert to his own use, any money, property, or thing of another which may be the subject of larceny, and which shall have come into his possession or be under his care by virtue of such employment, such officer, agent, clerk, employee, or servant shall be deemed guilty of embezzlement."

"That if any bailee, with or without hire, shall embezzle, or wrongfully convert to his own use, or shall secrete, with intent to convert to his own use, or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care or control, and which may be the subject of larceny, such bailee, upon conviction thereof, shall be deemed guilty of embezzlement."

See *Compiled Laws of Alaska* (1913), §§ 1926, 1927.

As embezzlement is purely a statutory offense we do not look to the common law for a further definition. (See 2 *Bishop on Criminal Law*, 7th Ed., § 325.)

And as to the point that the acts of Mitchell would not constitute "larceny or embezzlement," see

Guarantee Co. of No. America v. Mechanics' Sav. B. & T. Co., 100 Fed., 559;

Reed v. Fidelity & Casualty Co. of N. Y., 42 Atl., 294;

United States F. & G. Co. v. Egg Shippers' S. & F. Co., 148 Fed., 353;

Farmers' State Bank v. Title Guaranty & Trust Co., 113 S. W., 1147.

If the opening statement of counsel is to be taken as true, the acts of Mitchell with regard to the operations of the Revilla Fish Products Co. might well be said to constitute fraud, dishonesty, or wrongful misapplication, so as to bring them within the terms of the new bond. Undoubtedly this was the purpose of the plaintiff in error in securing from the company not a continuation of the old bond, such as it had secured each year, but an entirely new and different obligation. To assert, then, that the new bond written after the relations and obligations between the parties were at an end is no more than a renewal or continuation of the old bond would seem to be fallacious upon its face.

No Action Could Be Maintained on the Policy of 1911 Unless the Loss Was Discovered within Six Months After the Date of the Termination of That Policy, and Likewise as to the Policy of 1912.

That each one of the policies and renewals constituted a separate and distinct contract, and the liability upon the policy or renewal for any one year related only to losses occurring during that year and discovered within six months thereafter, is a construction based not only upon authority but upon reason. We assert that a better demonstration of the propriety of the construction we seek to place upon these contracts can not be had than is offered in the present case. Surely it is the plain duty of a

principal who has entrusted his funds to an agent, and especially when that property is made up of the funds of depositors, to maintain such a supervision and timely to conduct such investigation as will discover any peculations or fraud on the part of the agent. It is not designed that the principal may permit his agent's conduct to continue year after year without investigation. Therefore, the policies were written so as to give a reasonable length of time after the term thereof in which an investigation and discovery might be made. In this case that period is fixed at six months, and it is surely a reasonable period. At the end of that time the insurer is absolved from liability if no loss has been discovered. We are not without authority directly in point.

In the case of *Proctor Coal Co. v. U. S. Fidelity & Guaranty Co.* (Ga.), 124 Fed., 424, the bond was issued by the same company and in all essentials, as far as we can gather from the published opinion, identical with the original bond in this case.

Elliott on Insurance, Sec. 293,
Richards on Insurance, Sec. 284. a discussion of this case, *Proctor v. U. S. Fidelity & Guaranty Co.*, on page 45 of its brief, contains unintentional misstatements as to the facts. The Court said in discussing the very contention we are now making (pp. 427-430):

“I think the contention of counsel for defendant that these renewals are separate and distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or of any subsequent renewals. The language referred to is this: ‘Make good and

reimburse to the employer all and any pecuniary loss sustained by the employer', etc., 'occurring during the continuance of this bond or any renewal thereof, and discovered during said continuance, or within six months thereafter.' I am unable to agree with the argument of plaintiff as to the proper construction to be put upon this language. I think it should be construed so as to read in this way: 'Occurring during the continuance of this bond or any renewal thereof, and discovered during the continuance of this bond, or during the continuance of any renewal'; that is, that the discovery must be within six months of the expiration of the original bond, or within six months of the expiration of any renewal thereof. I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the original bond and the two renewals. The correct view seems to be that each renewal is a separate and distinct contract, and such I think is the effect of the authorities on the subject.

* * * *

"In the second renewal the language is:

" 'In consideration of the sum of twenty-five dollars, the United States Fidelity & Guaranty Company hereby continues in force bond No. 27178 in the sum of five thousand dollars,' etc.

"It is claimed that the language, 'hereby continues in force,' gives strength to the argument that the contract was a continuous one from the beginning of the original bond to the end of the last renewal.

"While there is some force in this contention, I do not think the use of this language is sufficient to change the conclusion reached that these renewals are new and distinct contracts.

* * * *

"It is claimed that, if the court should hold that the renewals are new contracts, the effect

of so holding would be to destroy the provision of the contract which gives the insured the right to discover a defalcation within six months after the termination of the bond. I do not think so. In my opinion, the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover within six months after the expiration of the original bond or any renewal the dishonest acts of the employe, and to claim indemnity for the same. The original bond and each renewal stands for the malfeasance of the employe during the continuance of each and discovery within six months after the termination of each."

The decision of the Circuit Court of Appeals for the Third Circuit in *Fidelity & Casualty Co. v. Consolidated Nat. Bank*, 71 Fed., 116, is directly in point. In that case a bond had been issued in 1889 and regularly renewed and extended to 1894. A claim was made for an embezzlement which occurred during the last year and was timely discovered. This liability was admitted. A further claim was made for previous embezzlement not discovered within the period prescribed by the bond, it being alleged that this discovery was prevented by fraudulent concealment. The wording of the bond in that case differs slightly from that in our case. We parallel them.

"* * * which has been committed during the continuance of the said term, or any renewal thereof, and discovered during said continuance, or within six months thereafter."

"* * * and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter."

We submit that the addition of the second phrase "any renewal thereof" in our bond, which was not written in the bond of the other company, really effects no change, because if there is a renewal then there is a continuance of the term, as the two words seem to be synonymous. Upon these facts the Court said (p. 120):

"The manifest intent was to create a bar, and to the provision inserted for that purpose there cannot be annexed an exception or qualification not warranted by its terms, and the implication of which the circumstances of the case forbid. The object was to preclude liability for a number of defaults, extending over a longer period than one year, and yet the present claim is that, in addition to \$5,000, the amount of the embezzlements within such period, the indemnifying company is chargeable with the amount of other embezzlements which had been committed during a prior term. We cannot sustain this demand, because to do so would, as we think, involve a misconstruction of the condition, and the defeat of its purpose. The bank's position rests upon the assumption that it would have recovered its earlier losses, by action upon this bond, but for the fraudulent postponement of their discovery. Let this be conceded, still it is obvious that seasonable discovery of the preceding dishonest acts would have rendered the perpetration of the succeeding ones impossible, and hence that the entire liability now asserted is one which could not possibly have accrued if discovery of the earlier embezzlements had been made within the prescribed time; and it is not possible to hold, in the face of a condition limiting liability by a requirement of discovery, that, by reason of non-discovery, the liability so limited was extended or enlarged."

The case of *Florida Cent. & P. R. Co. v. American Surety Co.*, 99 Fed., 674, decided by the Circuit Court of Appeals for the Second Circuit, can not be distinguished upon principle. In that case the surety company up to 1891 annually issued a new bond of indemnity. Subsequent to that year it continued the bond in force by issuing a notice guaranteeing the employes of the railroad company. Under the terms of the original bond the company was liable only for such loss as should be discovered during the term of the bond. This was modified, however, by a rider giving six months after the term of the bond in which to discover the loss. In that case the guaranty notice issued each year did not expressly limit the term of the insurance to one year, but the Court concluded that inasmuch as it was issued annually it indicated that the meaning was that the guaranty should terminate each year unless renewed. There was in the rider a provision that the aggregate liability of the company should not exceed the amount of the last guaranty or bond. In our case there is likewise an express provision that the liability shall not exceed the amount of the one bond. Although the bond in the case we are now discussing differs in some respects from the bond in the present case, a close analysis will demonstrate they are not to be differentiated upon principle. In that case a claim was made for losses for previous years, based upon the contention that there was a continuing liability. The Court declined to sustain this contention, saying (pp. 677, 678):

“Such being the case, the meaning of the part of the contract which declares that upon the execution of a stipulated amount of risk or insurance in behalf of an employe the company shall not be responsible under any previous insurance of said employe becomes clear, and is that, when a new schedule of the amount of insurance in behalf of any employe formerly on the schedule has been executed or completed, and actually or constructively accepted, the old or previous insurance against losses previously committed by him is at an end, and that for these losses the company is no longer liable. The contract further declares that only the last insurance of the employe shall be in force at one time. These provisions are inconsistent with the theory that it was the intention or the idea of the parties that a continuing liability for old and undiscovered losses in continuous previous years was being piled up in each renewed contract.”

It would seem, therefore, fair to say that our contention is directly sustained by the Circuit Court of Appeals for the Second and Third Circuits.

Nor are we lacking in direct authority from other courts.

The case of *U. S. Fidelity & Guaranty Co. v. Williams* (Miss.), 49 So., 742, presents our case almost exactly. It was a bond issued by the same company in the identical terms. We quote from the decision (pp. 743, 744):

“‘In *Insurance Company v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115, the court said: ‘A renewal of a policy is, in effect, a new contract of assurance, and, unless otherwise expressed, on the same terms and conditions as were contained in the original policy.’ To the same effect is the

case of *Brady v. Insurance Co.*, 11 Mich. 425. The court said: 'We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insured was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued.' Such contracts standing as distinct and separate contracts, the rights of the parties must be determined under them as such. A renewal of the bond did not alter, change, limit, or increase the rights of the parties under the bond; nor did such renewal increase or limit the time for the performance of any act which is required to be done by the parties to maintain their rights under the bond. When the bond speaks of acts 'committed during the continuance of said renewal thereof,' it has reference to the bond as one contract and the renewals thereof as another and distinct contract. For the fraud or dishonesty of the employe during the time covered by the bond no recovery could be had under the renewal contract, nor will the contract of renewal enable the assured to maintain an action on the bond which had been barred by the lapse of time.

* * * The company desired by these provisions to require vigilance on the part of the employer to discover and give notice of the fraud or dishonesty of the employe. It was of the utmost importance that this be done. The company could protect itself to some extent by having such information. It required, and had the right to expect, vigilance on the part of the employer. * * * It is not contended by counsel for appellant that the provisions of the bond limiting the liability of the company are not binding on him; but it is insisted, in effect, that a renewal of the bond in 1893 would have the effect of continuing the liability of the company for

acts committed during its continuance or renewal thereof, if the discovery should be made, and notice given thereof, within the time stated. To illustrate: Suppose the fraud and dishonesty of Ramsey on account of which this action was brought had occurred between January 19, 1891, and January 19, 1892, the period covered by the bond, and discovery could be made between January 19, 1893, and January, 1894, the period of the alleged renewal, and notice given of it would be a compliance with the terms of the contract, and the liability of the company would thus be continued. If this be a proper interpretation of the contract, then, had there been 10 renewals, the company's liability would continue under them for acts committed during the first year of the guaranty. As heretofore stated, we believe the bond is a distinct contract, and the renewals are separate and distinct contracts, but out of the same terms of the bond. Therefore the liability of the company for an act committed during a given period must be determined by the terms of the contract in force at the time of its commission, and a subsequent renewal does not extend the time for the disclosing of the wrong and the enforcement of a liability of the company therefor.' See, also, the cases of *First Nat. Bank of Nashville v. United States Fidelity & Guaranty Co.*, 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765, *Praetor Coal Company v. United States Fidelity & Guaranty Co.* (C. C.), 124 Fed. 424, *Fidelity & Casualty Co. v. Consolidated Nat. Bank*, 71 Fed. 116, 17 C. C. A. 641, and many other authorities cited in *Frost on Guaranty Insurance* (2d Ed.), p. 99, § 40 *et seq.*

"These bonds are separate and distinct contracts, and do not constitute a continuing bond, as contended by counsel for appellee. Each bond is liable for such losses, and only such losses, as occur during its separate life, which is fixed by the contract for

one year each, and discovered during the continuance or renewal, or within six months after the expiration of the year, but always limiting the right of recovery to losses which actually happen within the life of the particular bond."

In *Long Bros. Grocery Co. v. United States F. & G. Co.* (Mo.), 110 S. W., 29, a bond had been issued which was continued in force by a renewal certificate. The claim was made that inasmuch as the original bond was void because of misrepresentations the same vice was carried into the second bond evidenced by the renewal; but the Court held that this contention could not be sustained inasmuch as the renewal evidenced a separate and distinct contract, saying (p. 31):

"The rule is generally recognized that: 'A renewal of a policy constitutes a separate and distinct contract for the period of time covered by such renewal. It is, however, a contract with the same terms and conditions as is evidenced by the bond which is renewed, because the renewal receipt recites that it is renewed in accordance with the terms of the bond.'"

In the case of *Brady v. The Northwestern Ins. Co.*, 11 Mich., 425, 443, it is said:

"We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party, and a renewed promise by the

other; and an obligation revived or continued under such circumstances, is an original obligation. It must be asked for by the one, and may be assumed or refused by the other; and the policy, which is its evidence, is therefore only continued by the positive act of both parties. This is according to the terms of the policy, and of the certificate of renewal; and the fact that the insurance company, by the very terms of the certificate of renewal, required payment therefor, and that such certificate should be countersigned by the resident agent before it should become operative, shows that the company regard the renewal as a new contract, made at their option, and dependent in some degree upon the judgment and knowledge of such agent."

The plaintiff in error cites against these cases *United States F. & G. Co. v. Citizens' Nat. Bank of Monticello*, 143 S. W., 997, and *United States F. & G. Co. v. Shepherds' Home Lodge No. 2*, 174 S. W., 487. If these two Kentucky cases adopt a rule contrary to our contention, we can only say that they put themselves in opposition to the decisions we have cited and in opposition to the generally accepted rule. While they appear at first blush to be in point and to sustain the contention of counsel that the original bond and renewal certificates constitute one continuous contract, they may nevertheless upon close consideration be differentiated. In the first place the Court of Appeals of Kentucky in the *De Jernette* case (*De Jernette v. Fidelity & Casualty Co. (Ky.)*, 33 S. W., 828) had construed a contract and renewals similar to those in the present case as constituting

separate and distinct contracts; and the Court bases this conclusion upon the fact that renewal certificates were issued for a definite period, *just as they were issued here*. (See Tr., p. 28.) The Court said (p. 829):

“When the bond speaks of acts ‘committed during the continuance of said renewal thereof,’ it has reference to the bond as one contract and the renewals thereof as another and distinct contract. For the fraud or dishonesty of the employed during the time covered by the bond no recovery could be had under the renewed contract, nor will the contract of renewal enable the assured to maintain an action on the bond which had been barred by the lapse of time.”

Applying the above rule to the facts of the *De Jernette* case, the Court there held that notwithstanding the renewal there could be no recovery upon the old bond when the loss had not been discovered within three months after its expiration. Thus the rule stood in Kentucky when the two later cases were considered. In each of these cases the conclusion that the bond and renewals constituted one continuous contract was predicated upon letters written by the surety company which treated them as one continuous contract. In other words, the conclusion was based upon what appeared to be a practical construction given by the parties to the contract. That the Court did not intend in the later decisions to overrule the *De Jernette* case is clearly evident from the following language in the *Shepherds’ Home Lodge* case (174 S. W., 487, 489) where it is said:

“The letter written by the company on February 1st, quoted above, treats the present contract as a ‘renewal,’ and requests payment of premium, so that a ‘continuation certificate or a new bond’ may be issued. The words, ‘renewal,’ ‘continuation certificate’ and ‘new bond’ must have been used synonymously, and the company clearly intended them as renewals, with the effect which the court gave them. The officers of the lodge so considered them, for the certificate of fidelity, which we have already copied and referred to, concludes with the statement: ‘We know of no reason why the guaranty bond may not be continued.’”

“We do not believe the facts of this case bring it within the rule of *De Jernette v. Fidelity & Casualty Co.*, 98 Ky. 558, 33 S. W. 828, 17 Ky. Law Rep. 1088. In that case indemnity was afforded from year to year by renewal receipts, *and it was specifically stated in each that only the annual period was covered.*” (Italics ours.)

Furthermore, it does not appear that the bond in either of the last two Kentucky cases contained the provision which is in our bond, as follows (Tr., p. 26):

“That the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employee, and upon the issuance of any Bond subsequent hereto upon said Employee in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company.”

Or, if those bonds did contain such a provision no

consideration was given it. This clause last quoted means something, and there is no reason why we should not give it the meaning which its plain language implies. It would seem palpably fallacious to contend that the old bond is in force or that there could be responsibility under it when it expressly provides that responsibility under it shall cease and determine when the new bond is issued.

Reading the clause last quoted, together with the clause which requires discovery to be made within six months after the end of the term, the meaning is clear to this effect: At the end of one year, or upon the issuance of a new bond, there is no liability for any loss except such as was occasioned during that year, and at the end of six months after the end of that year all liability ceases for any loss not suffered within the twelve months and discovered within eighteen months. To hold otherwise is to fail to give effect to the clause quoted.

The plaintiff in error relies with confidence upon the Tennessee case, *First National Bank v. Fidelity & Guaranty Co.*, 110 Tenn., 10, 100 Am. St. Rep., 765. The writer of the brief could not have given careful consideration to that case or to the language of the bond construed. The language there is (p. 773):

“ ‘Make good and reimburse to the employer to the extent of seven thousand dollars, and no further, all and any pecuniary loss sustained by the employer, occasioned by the fraud or dishonesty on the part of the employe in the employer’s service, and occurring during the continuance of this bond or any renewal thereof, and discovered

during such continuance or renewal, *or any time thereafter.*' " (Italics ours.)

It will be readily observed that the last phrase differentiates the case entirely from the present case, for there the right to recover for a loss under any one of the bonds or renewals would only be limited by the general statute of limitations.

The case of *Philadelphia Casualty Co. v. Fecheimer*, 220 Fed., 401, from the Circuit Court of Appeals for the Sixth Circuit, referred to by plaintiff in error, is by no means in point. There was an indemnity bond insuring against loss on commercial accounts. There was a provision that losses occurring on goods shipped under the old bond would be covered under the renewal bond: "If this bond is renewed on or before the date of termination thereof by the issuance of a new bond," etc. A new bond was issued, and the contention was offered that it was not a renewal of the old bond because it did not so state expressly. The attenuation of such a contention is manifest, and the Judge in writing the opinion merely says that it is manifest from the clause above quoted that the renewal contemplated by the parties was to be by the issuance of a new bond.

We believe it will serve no useful purpose to encumber the brief further by an analysis of the other cases to which counsel refers in his brief.

The opinion written by Mr. Justice Lurton and the opinion written by Judge Taft, referred to in the

brief, are in cases which bear no analogy whatever to the case at bar, and an examination will convince the Court that the same may be said of all the other cases quoted in support of this particular contention of counsel. We conclude, therefore, that each renewal constituted a new and independent contract running for one year, and that all liability upon each one of these contracts for an undiscovered loss occurring during the year terminated at the end of six months after the end of the year.

The Action of the Court in Rejecting Offer of Evidence.

We believe the fallacy of counsel's contention in this regard will appear from a statement of what actually occurred.

We moved to exclude testimony touching any alleged loss occurring prior to April 1, 1913, for the reasons that it appeared from the complaint and the statement of counsel that no loss was discovered until more than six months subsequent to April 1, 1913.

Counsel for plaintiff in error then made the following offer (Plaintiff's Brief, p. 11):

“MR. ROBERTS: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal, and was, as a matter of fact, a continuation of the contract of insurance and one of the continuations by renewal from year to year from 1906, and that it was agreed between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to

year, and that the bond or instrument dated April 1st, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff's complaint."

We understand counsel's contention to be that he was entitled to prove that the bond issued in November, 1913, dated back to April 1, 1913, was given as a renewal and a continuation of the original contract of insurance evidenced by the bond dated in 1906.

We are willing to concede the rule that rejected offers must be considered as proven for the purposes of such a motion as was made in this case, but we will not concede that a Court is bound to sit by and entertain an offer to prove something which is contrary to an admitted fact.

The bond dated April 1, 1913, is not a renewal or continuation of the old contract. It is a new bond, complete in itself, containing conditions totally unlike the conditions of the other bond. No construction or extraneous evidence could make it otherwise unless it made it a contract entirely different from what it is.

The plaintiff in error pleaded and relied upon this new bond, and set it forth in terms in its complaint. It says in its complaint (see Tr., p. 8) :

"That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit 'C' and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursu-

ance of the original agreement and contract indemnifying and insuring said bank as hereinabove stated and as a part of the same transaction."

The "transaction" referred to is set forth in paragraphs IV and V of the complaint (see Tr., pp. 3 and 4), being to the effect that the company agreed to issue a bond and to keep the same renewed from year to year, and further agreed to issue the best bond and the highest grade of insurance to be had in that line of surety and fidelity insurance. But, counsel upon the trial expressly stated that he would not offer any testimony to the effect that the company agreed to furnish the most favorable form of insurance policy. (See Tr., pp. 87 and 105.) Therefore, all there can be to the agreement is that the surety company was to keep the insurance renewed from year to year. In other words, having issued a policy in 1906, it would keep this policy renewed from year to year.

But, in November, 1913, the plaintiff in error made an entirely different arrangement with the surety company, and, for reasons manifest, took an entirely different contract of insurance. Therefore, if there ever was such an agreement on the part of the surety company to keep the old policy renewed from year to year, the plaintiff in error, of its own volition and in order to secure a fancied advantage, abandoned that agreement and took a new and entirely different contract.

It is manifest that the offer made by counsel was an offer to prove that the contract which he had

pleaded and upon which he relied was something other and entirely different. In other words, he pleaded and relied upon one contract and offered to prove another. We submit that the Court below was right in declining to entertain such an absurdity.

Plaintiff in error, having accepted the contract dated April 1, 1913, as it was written, is now estopped from proving that it is another contract than it purports to be. For these reasons it is deemed entirely unnecessary to discuss the various authorities cited by counsel to the point that oral testimony will be heard to enlarge or modify the terms of the written contract.

Of course, it goes without saying that if the contention we have previously made is correct it would make no difference what counsel proved as to the agreement to renew or continue the bond of 1906, because, in any event, all liability under the bond dated in 1911 and the bond dated in 1912 terminated when six months had elapsed without the discovery of any loss.

But is it not a fact that counsel attaches a significance to the term "renewal" which it does not deserve? Broadly speaking, perhaps, whenever one who has had insurance secures another policy, whether the old policy has lapsed or not, it amounts to a "renewal" of the insurance, and in that sense the term may be applied to any new insurance. Here, however, we have a case where not only had the policy lapsed but all liability was at an end. It seems hardly possible that, whether the new policy be called a re-

newal or designated by any other term, it could operate to revivify a liability or responsibility for past acts which was dead. Yet that, in its last analysis, must be the plain contention of counsel.

Parole proof would, of course, not be admissible to vary or enlarge the terms of the contract. Counsel, however, stated that he had written evidence, and we must take him at his word.

Now, if there was any writing contemporaneous with the new bond, or even collateral thereto, which would translate the bond into something other than what it is upon its face, such writing was as much a part of the contract as was the bond itself, and instead of pleading and relying upon the bond Exhibit "C" the plaintiff should have pleaded its entire contract. Failing to do so, it is bound by the contract it pleaded and limited to such evidence as will sustain that contract and not an entirely different one.

The Plaintiff in Error Has Mistaken Its Remedy.

A reading of the complaint in this action will convince that the plaintiff in error has mistaken its remedy. It seeks to recover upon a bond which was not issued, relying upon the contract alleged in paragraphs IV and V of its complaint. If it be true that the surety company agreed to issue a bond and to renew it year by year and did not do so, it should sue first to have its bond established, and, having secured the reinstatement of such a bond as it thinks should have been issued, to sue upon that bond.

Indeed, it is not easy from a cursory reading of the complaint to determine just the way the plaintiff in error is endeavoring to shape its action. According to paragraph IV of its complaint, there was an agreement that the surety company would from year to year keep the insurance in force without "trouble or annoyance to the plaintiff or its officers, *except the payment of the annual premium.*" The bond was renewed from time to time and the premium paid from time to time so that the last bond terminated April 1, 1913. Then over six months was permitted to elapse, no renewal or new bond being issued *and no premium paid.*

Thereupon and after all rights and obligations had terminated the parties meet again, and the bond of November 25, 1913, is issued as evidencing the contract of the parties. Now it seems to be the theory that this contract made in November is not only what it purports to be, to-wit, a contract insuring against the dishonest acts of Mitchell from April 1, 1913, until it should be terminated, but that it is something more—that it is a contract resurrecting and re-establishing a liability which had lapsed for acts occurring in 1911 and 1912. In other words, that this instrument is not the real contract of the parties. Plaintiff in error, having brought the action as it did and so shaped its pleadings, now asserts that it is entitled to prove another and a different contract. We respectfully submit this is not a question of evidence but involves a question of procedure.

The plaintiff in error brought its action upon the law side of the Court, and now seeks either to recover upon a contract which is not in existence or to reform the terms of one which is. It is elementary that this may not be done in the Federal Courts, but that plaintiff in error should have gone into equity first to establish or reform its contract before it sued upon it at law.

But, perhaps there is another possible theory in the mind of plaintiff in error. It alleges that we agreed to keep the bank insured against the acts of Mitchell; this we failed to do. Now, if the bank had a valid and enforceable contract obligating us to issue insurance each year and we failed to comply with that contract, by reason whereof plaintiff in error suffered damages perhaps (and we say "perhaps"), there would be an action against us to recover such damage. But that would be another action; and that is exactly what the Court below had in mind when it said (Tr., p. 118):

"Now, as to the statement in relation to failure on the part of the insurance company to renew this bond, and that there was an agreement on their part to keep it in force, that can't obtain here. If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action. That would not be this action—but an action upon a contract. That is upon another ground or theory, and could not be invoked here."

Groping as we are to discover the real theory under which plaintiff in error is seeking to recover,

this may be suggested: That perhaps it is the theory of plaintiff in error that the last bond was given as a continuation of the old bond and that it can recover upon both. This theory would seem to leave the plaintiff in error in no better predicament, for surely it can not maintain an action upon both bonds for the same act. The Judge below understood this when he said (Tr., p. 117) :

“If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one.”

To notice further the authorities which the plaintiff in error has cited and quoted from would be to extend this brief beyond the limit which we think the case demands.

The plan conceived by the plaintiff in error is altogether too apparent, and we can not believe that the law will lend countenance to it.

To summarize the questions presented by the record in this case, we submit that the judgment of the Court below must be affirmed for the following reasons:

1st: No contention is made by plaintiff in error in its assignments of error or in its brief that the loss suffered by the plaintiff through the alleged acts of “fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act” by Mr. Mitchell subsequent to April 1, 1913, under the last bond, was in excess of the sum of \$688.27, for which judgment was stipulated in the Court below.

2nd: That it appears from the statement of counsel that none of the acts charged against Mr. Mitchell would constitute "larceny or embezzlement" under the common law of Alaska.

3rd: That it is shown by the record that each renewal of the original bond was a new contract, liability under which expired six months after the date of expiration of the renewed bond.

4th: That if we should concede plaintiff in error's contention that the renewal certificates were not new contracts but the effect thereof was to continue in force the old bond for an additional and not a new contract period, then the bond expired on April 1, 1913, and no discovery of any loss thereunder was made within six months after the date of its expiration.

5th: That it is not claimed by plaintiff in error that there was any agreement at the date of the issuance of the last bond on November 25, 1913, or at any time, waiving the provision of the old bond exonerating the surety in case of failure to discover "fraud or dishonesty" amounting to "embezzlement or larceny" within six months after the date of expiration of the old bond.

6th: That the alleged agreement of April 1, 1906, by which it is alleged the surety company agreed to keep the bond renewed from year to year without any "trouble or annoyance to the plaintiff or its officers," if enforceable at all, referred to the original bond and was waived or abandoned by the new bond issued

November 25, 1913, reducing the annual premium and adopting an entirely new agreement by which the mutual rights and obligations of the parties were to be determined.

Respectfully submitted,

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No. 2626.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MINERS & MERCHANTS BANK, a Corporation,
Plaintiff in Error,
vs.

UNITED STATES FIDELITY & GUARANTY COM-
PANY, a Corporation,
Defendant in Error.

Petition for Rehearing.

JOHN W. ROBERTS,
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W. H. METSON,
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METSON, DREW & MACKENZIE,
Of Counsel.

Filed this.....day of August, 1916.

....., Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MINERS & MERCHANTS BANK, a corporation,	} No. 2626
<i>Plaintiff in Error,</i>	
vs.	
UNITED STATES FIDELITY & GUARANTY COMPANY, a cor- poration,	} No. 2626
<i>Defendant in Error.</i>	

PETITION FOR REHEARING.

Plaintiff in error presents this petition and prays that a rehearing of this case may be moved and ordered.

In the decision filed herein July 3, 1916, it was held that the so-called new or last bond was an independent contract of insurance, in no way related to the original bond, and that under the pleadings and the admissions of counsel there was no continuing insurance, and that there could be no recovery under the so-called new bond on account of a loss occurring within the term of the original bond. It was so held upon the sole ground that in some respects the terms of the

so-called new or last bond varied from those of the original bond.

This conclusion was reached without discussion and presumably without consideration of some of the most important factors of the case, indicating that the so-called new or last bond was no more than the last link in a chain of continuing insurance.

It will be admitted that the last bond is not *per se* the contract between the parties. At most it is a mere piece of evidence indicating with more or less conclusiveness what the contract was. The degree of its evidential conclusiveness depends upon the circumstances of the case.

The so-called new bond is not the only written instrument in the case calculated to evidence the nature and scope of the contract existing between the parties. There is the written application delivered to the surety company in 1906, on which the original bond was issued. There is the original bond (No. 450) issued April 1, 1906, insuring the bank for the "term mentioned (one year) or any subsequent renewal of such term." There are the six annual "continuation certificates" for the years 1907, 1908, 1909, 1910, 1911 and 1912, each "*continuing in force bond T. 450*" for the term of one year. There is the bank's letter to the surety company written in November, 1913, concerning the failure of the surety company to issue the customary "continuation certificate" on April 1, 1913, for the year 1913-1914 and insisting that the

“continuation” should be as of that date. Then there is the so-called new bond issued in November, 1913, but dated back to April 1, 1913, pursuant to the bank’s demand.

Clearly all of these writings have an evidential bearing upon the contractual relation of the parties and upon the question as to whether the nature and scope of that relation subsequent to April 1, 1913, was distinct and different from that existing theretofore. They must all be considered together before the true evidential significance and real legal effect of any one can be determined. We have here either one indivisible contract for continuing insurance evidenced by all of these instruments, as contended by plaintiff in error, or two distinct contracts, the second or latter evidenced alone by the so-called new bond, as contended by defendant in error. How can the court determine that question without giving due consideration to all of these written instruments?

The intention of the parties must be sought. That alone is the contract. All of these writings tend to reveal that intention. They must be all considered, and not alone as distinct evidential matters, but in respect to their relation one to the other as well. The so-called new bond came last in point of time, and, of course, as a mere writing, stands alone. But considered with the others and in the light of the continuing insurance previously in force, should this last writing be given the effect of merely continuing or

radically changing the contractual relation between the parties?

Here is no question of the parol rule, but rather due consideration of all the written evidence bearing upon the intention of the parties which is the contract; no question of varying the terms of this last written instrument, but determining what its terms signify when read with these other written instruments and in the light of the situation in which it was executed.

There are, besides these previous writings, two facts connected with the execution of the so-called new bond which should also be considered in determining whether it should be said to evidence a new contract or a mere continuance of the original bond. The last bond was issued without any suggestion or requirement that the bank make a new application for insurance with the customary representations and promises and warranties. Furthermore, the circumstances under which the last bond was issued were of the surety company's own making. Prior to 1913 all of the business between the parties had been transacted in Seattle. The officers of the bank were there, the original bond was written there and all of the six annual "continuation certificates" were issued there. Shortly before April 1, 1913, the surety company changed its Seattle agent and instead of collecting the premium for the ensuing year of 1913-1914 from the officers of the bank in Seattle, as had always theretofore been done, the new agent mailed the premium-due notice

to the insured employee at Ketchikan, Alaska. The guilty employee returned the notice with the statement that no further insurance was desired. In November, 1913, it having come to the knowledge of the officers of the bank that the premium for the year 1913-1914 had not been paid, they wrote as above stated demanding an explanation and a continuance of the insurance. The surety company acknowledged its responsibility for the situation by immediately issuing the last bond without the customary application therefor and dating it back to April 1, 1913. There is another fact that has a bearing upon the interpretation the last bond should receive. Its issuance was the result of the adoption of a new form of bond by the surety company. Its simpler form and more liberal terms were doubtless intended to appeal to the fidelity insuring public. The variance between its terms and those of the original bond will be considered later.

This appeal is from the judgment of the lower court following its ruling sustaining an objection to the introduction of any and all evidence on behalf of plaintiff and holding as a matter of law that there could be no recovery on account of any loss occurring prior to April 1, 1913, the date of the new bond. This court has affirmed that judgment upon the ground that the bond of April 1, 1913, was "a new and independent contract of insurance" for the reason that its terms were in some respects different from

those of the original bond. There is no indication that the so-called new bond was by this court construed and interpreted in connection with the original bond and the six "continuation certificates" which continued it in force up to April 1, 1913. There seems to have been a mere comparison of the two bonds. Nor was any consideration given to the circumstances of the issuance of the new bond. It was held to be "a new and independent contract of insurance" because its terms were broader than those of the original bond.

But its broader terms necessarily included the less broad terms of the original bond. Furthermore, recovery is not sought under any enlargement of the terms of the original bond but rather strictly within the narrower obligations of the old bond which were necessarily embraced and included within the broader obligations of the new bond.

The enlargement of the obligation of the surety company under the new bond as compared with the old bond can not bar recovery if it should be said from a consideration of the entire transaction that the new bond was given for the purpose and with the intention of further continuing the continuing insurance theretofore for seven successive years in force.

It is the contention of the plaintiff in error that there was but one transaction, one insurance and one contract. That major issue is clearly made by the pleadings and the admissions of counsel in their statements

to the jury upon which alone the lower court acted in ruling upon the motion to exclude and plaintiff's offer of proof. And that major issue as to whether the new bond was no more than the last link in an unbroken chain of continuing insurance, is in no wise dependent upon the allegations of the complaint as to a primary agreement for continuing insurance apart from the written instruments executed for its effectuation. The law makes the issue for us out of the interwoven written context of the entire transaction beginning in the spring of 1906 and ending in the fall of 1913.

Beyond all possible peradventure the original bond (No. 450) insuring against loss "during the term above mentioned (one year) or any subsequent renewal of said term," provided for continuing insurance. Beyond all possible peradventure the six "Continuation Certificates" "continuing in force Bond T. 450" did as a matter of fact and law continue that insurance to April 1, 1913. From April 1, 1906, to April 1, 1913, there was but one bond, viz: "Bond T. 450," but one insurance and but one contract. That insurance was continuing insurance and that contract was for continuing insurance.

The transaction was none the less single because of the recurring annual payment of premiums and issuance of "continuation certificates." The minds of the parties had clearly met upon the contractual core of continuing insurance and everything done orig-

inally and thereafter from year to year was by way of effectuating that mutual core purpose.'

That was the situation and contractual relation down to April 1, 1913. The bank has done absolutely nothing since that date by way of changing that situation and that contractual relation. Whatever has been done to effect a change has been done by the surety company who now pleads its own act as an excuse for refusing to fulfil its obligations after taking the bank's premium money.

It was clearly the fault of the surety company that the premium was not collected on April 1, 1913, and a "continuation certificate" issued as had been done every year for seven years. It was the rankest kind of negligence for the surety company to send the premium-due notice to Mitchell. It was not even addressed to the bank at Ketchikan but to the insured employee. This is admitted by counsel for the surety (Tr., p. 109). This negligence the surety company acknowledged and undertook to cure when in response to the complaint and demand of the bank in November, 1913, it issued the so-called new bond without application and dated it back to dovetail with the last "continuation certificate."

What was it that the bank demanded in November, 1913? A new bond? No. A new contract of insurance? No. A more liberal contract? No. Coun-

sel for the surety company in his statement to the jury said (Tr., p. 80):

"Then in November some time they come to us and say, 'How is it that *that bond* was not issued in April? We wanted *that bond*.' Of course they had not paid any premium for any bond, but they said, 'We want *that bond*, and will you kindly write it and date it back to April 1st.'"

The statement of counsel for the bank as to this matter is as follows:

"The bank here at Seattle had procured that bond, in the first instance. It had paid the premium, and the business had all been transacted here, and but for the change of the agency, to which counsel referred, that renewal certificate would have been issued by the old agency. Then we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this company, and asked them—called their attention to it, and they agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way they got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of all companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally."

The contractual relation between the parties calling for continuing insurance having been established and without break maintained down to April 1, 1913, that relation and that contract and that continuing insurance could be changed to a new contractual relation on the basis of broken term insurance only by the assenting action of both parties. The original bond, No. 450, unquestionably bound the surety company to give the bank continuing insurance. The six "continuation certificates" so far from evidencing independent contracts for broken annual term insurance, by their terms expressly recognized the obligation under "Bond No. T. 450" for continuing insurance. They each expressly "*continue in force Bond T. 450.*" And therein by their express terms sharply distinguished themselves upon the premium receipts or certificates held to evidence independent annual term contracts in the cases cited and relied upon by the surety company of the class represented by

De Jeanette v. Fid. & Cas. Co., 98 Ky., 558,
33 S. W., 828;

Fla. Cent. etc. Co. v. Am. Surety Co., 99 Fed.,
674;

Proctor Coal Co. v. U. S. F. & G. Co., 124
Fed., 424.

The contract for continuing insurance being thus firmly established, and being in writing, was unquestionably maintained down to April 1, 1913. Was it

then or thereafter changed or modified? and if so how? Certainly not by any act or assent of the bank. In November, 1913, we find the bank standing firmly upon its contract rights and insisting that it was entitled to "*that bond*." They write, "How is it that that bond was not issued in April?" To their non-technical minds the "continuation certificate" was "*that bond*." "We want *that bond*, will you kindly write it and date it back to April 1st?" The old agent of the company had discovered that the April premium had not been paid and the customary "continuation certificate" issued, and after taking it up with the surety company and the company having admitted that the bond should be renewed, called the matter to the attention of the officers of the bank.

Clearly the bank was standing and insisting upon its right under the written contract to a continuation of the insurance for the year 1913-1914. It is equally clear that the surety company *then* intended that the bank should believe that it was getting what it demanded under the existing contract, viz.: continuing insurance for the year 1913-1914. It promptly acceded to the demand for "*that bond*" by issuing the so-called new bond, without a new application and further post dated it to match the requirements of continuing insurance. Clearly the bank thought and believed that it was getting what it demanded, viz.: its right under the existing contract to continuing insurance. And as clearly the surety company wished

and intended that the bank should so think and believe. They took the bank's premium money for the year 1913-1914 and gave it what? *A policy of continuing insurance!* A policy of indefinite term, terminable only upon three contingencies, viz.: (1) Upon written notice by the bank, (2) Upon written notice by the surety company, (3) Upon non-payment of annual premiums, (4) Upon discovery of loss through the employee insured.

The surety company contends *now* that the new bond while it was for continuing insurance did not continue the continuing insurance unquestionably called for by the earlier contract; that by its juggling substitution of the so-called new bond for the customary "continuation certificate" it was enabled to step out from under its contractual obligation for continuing insurance and assume its smug stand upon a new and independent contract of insurance. That while the original bond called for continuing insurance and the new bond calls for continuing insurance the chain of continuity was broken by the giving of the new bond.

It will be admitted that the bank requested and demanded and thought it got continuing insurance in which there was no break. The surety company must admit that it knew the bank so thought and believed. But they say the foolish bank lost its right to continuing insurance by accepting the new bond instead of the customary "continuation certificate"; that the more

liberal terms of this so-called new bond must in law prevent its being considered as a continuance of the original bond.

This new form of bond adopted by the surety company was calculated and doubtless intended to be attractive to the fidelity insuring public. It was a well calculated lure for renewal as well as new business. Its purpose was to get more business and more money. It is claimed by the surety company that its variant terms make it, in this case, a new and independent contract of insurance. That notwithstanding the request and demand of the bank for "*that bond*" of continuing insurance under the existing contract represented by the original bond, and notwithstanding the bank thought it was getting "*that bond*" of continuing insurance when it paid the renewal premium for the year 1913-1914, and notwithstanding the surety company pretended to accede to the demand of the bank and without requiring or suggesting a new application for insurance issued the new bond and dated it back to correspond to and connect with the last "continuation certificate," the so-called new bond by reason of its broader terms became and was a new and independent contract of insurance, in no way connected with or a continuance of the continuing insurance called for by the original bond. And with a truly brazen effrontery the surety company asks this court to place the seal of its approval upon this flim-flam game and say that in spite of the bank's un-

doubted contract right to continuing insurance, and the payment of its premium money in the belief that it was getting continuing insurance, the surety company by the substitution of this so-called new bond for the customary and stipulated "continuation certificate," successfully "put one over" on the bank and eluded its obligation and liability under the original bond and its six formal "continuations." In the language of Kipling that is "a damned tough bullet to chew" and it is here suggested that this court is not required to masticate it.

Let us examine the variant terms of this so-called new bond which according to the surety company's *present* contention so deftly and completely emasculates the right of the bank to indemnity notwithstanding its payment for eight years of the price of such indemnity. It is identical with the original bond in that it is issued to the bank and insures the fidelity of a certain employee. It is identical with the original bond in that it provides for continuing insurance, conditioned only upon the payment of the annual premiums. It is identical with the original bond in the amount of the insurance. The only difference between the two bonds is that to be discovered in the liability clause. The original bond insured the bank against loss by reason of the fraud or dishonesty of the employee amounting to embezzlement or larceny. The guaranty of the so-called new bond is against loss occasioned by any act of fraud, dishonesty, forgery,

theft, larceny, embezzlement, wrongful abstraction, or misapplication or misappropriation or any criminal act of the employee.

It is sufficiently evident that the narrower liability of the original bond is embraced and included in the broader liability of the new bond. If the so-called new bond should be held to continue the continuing insurance provided by the original bond it would amount to a continuance of the liability fixed by the original bond as to losses occurring prior to April 1, 1913, coupled with the broader liability provided by the new bond for any loss occurring subsequent to April 1, 1913. Such a construction of the new bond would satisfy the right of the bank to a continuance of the continuing insurance provided for by the original bond and at the same time give the bank the benefit of the more liberal terms of the new policy as to any loss that might occur subsequent to April 1, 1913. That would be "the more reasonable interpretation, and accord more nearly with the justice of the matter" (*Am. Credit Ind. Co. v. Champion*, 103 Fed., 609), for not only should the surety company be held to have intended to keep faith under the original bond, but it should be presumed to have intended to extend to this old customer the benefit of its new and more liberal policy of insurance as to future losses.

Was not that the intention? May we not infer as a matter of law that the surety company wanted

and intended to play fair, and that its present notion as to the so-called new bond being a second and independent contract for continuing insurance was later born of the exigency of a threatened \$25,000 loss?

It is an accepted rule that a contract of this character will be construed strictly against the surety company and in favor of the party insured. The reason for the rule is apparent in high degree of technical knowledge concerning the general subject-matter presumably possessed by the insurer and the presumably relative meager equipment possessed by the insured for a technical estimate of the legal effect of policy forms tendered him. The insured has no choice but to accept or reject the forms of policy tendered by the insurance company. He can take them or leave them. If he wants insurance he must accept what is offered. There is no chance for him to insist upon a form of policy to his liking. On the other hand the insurance company incubates its policy forms much as a spider spins its web. The controlling idea being to put out a form that combines the greatest seeming liberality with the least real liability. That being naturally true the courts have reasonably held that such contracts will be strictly construed against the party that prepares them and forces their acceptance by the insuring public.

Viewed in the light of this reasonable rule, and of the existing written contract for continuing insurance represented by the original bond, and its six "continua-

tion certificates," and the fact that the bank demanded a further continuance of such continuing insurance, and the further fact that, in writing the new bond in response to that demand and without new application therefor and by post dating it to match the last "continuation certificate," the surety company led the bank to believe that it was getting the continuing insurance demanded, a just construction of the new bond, including as it does within its more liberal terms the narrower liability of the original bond, should NOT hold the new bond to be an independent contract of insurance totally disconnected with the preceeding seven-year contract for continuing insurance.

Every contract has its object and its subject. The object of the contract naturally constitutes its dominant note. If there be uncertainty or ambiguity as to its terms, or, if, where several writings evidence the contract, as here, their true relation each to the other is a matter of uncertainty or doubt, the object of the contract or purpose to be served should be consulted as evidencing the intended significance of the terms employed.

There can be no manner of doubt in this case that from first to last the object of the bank was continuing insurance. The first bond provided for it. The six "continuation certificates" provided for it. The new bond provided for it. The sole question presented by this record is as to whether the object and purpose of the new bond for continuing insurance was to con-

tinue the continuing insurance provided by the original bond, or to initiate a new and independent contract for continuing insurance altogether detached from and disconnected with the pre-existing contract for continuing insurance. The bank says that it was all one transaction having the single object of continuing insurance. The surety company contends that the object of continuing insurance under the original bond had been completely consummated and that the new bond constituted a new contract notwithstanding its object was also continuing insurance; that there was no connection between the object of the original bond contract for continuing insurance and the object of the new bond for continuing insurance. The falsity of this later born conception of the surety company is manifest upon the face of its welching contention.

There can be no doubt or question about the bank's understanding of the so-called new bond, or that it thought and believed it was paying for and getting continuing insurance. Similarly there can be no doubt or question about the surety company's understanding that the bank paid its 1913-1914 premium with that thought and belief. And the sole question raised by this appeal is as to whether the surety company should be permitted to "shift the cut" on the bank and side-step its liability when a loss is discovered.

Fidelity insurance is necessarily and essentially a gamble. The surety company wagers the amount of

the penalty of its bond against the premiums provided for on the average honesty of men. Rarely it loses; generally it wins. The gamble is legitimate on both sides. The employer can afford to add the premium to the overhead charge for the sake of the assurance. Experience has demonstrated that the surety company on a broad average can afford to make the bet.

There are square roulette wheels where the fixed percentage makes the game profitable for the banker. There is a crooked wheel known as a "mule's ear" where a covertly manipulated needle out-thrust in the runway of the little ball forestalls the heavier losses. It is here submitted that this so-called new bond with its more liberal terms was, in this situation, a covertly manipulated needle in the runway of the surety company's liability. If this "mule's ear" be within the law then nothing is required but a certain amount of dexterous manipulation to make fidelity insurance a "sure thing" game.

The brief of plaintiff in error heretofore filed herein affords ample grounds for reversal. It is conceived that the principal function of a petition for rehearing is to make the court really *want* to review its former ruling. This is most likely to be accomplished by indicating that the former decision amounts to a miscarriage of justice. That appearing it is assumed that the court will gladly embrace the opportunity of reconsidering the law of the case with a view

of determining if indeed the law really requires the seeming miscarriage of justice.

There is really but one legal proposition here involved that was not fully and exhaustively considered in the brief of plaintiff in error. That is, that in construing a contract the intention is to be collected, not from detached parts of the instrument, but from the whole of it; and where several instruments are made as a part of *one transaction*, they will be read together, and each will be considered with reference to the other.

9 *Cyc*, 580, and many cases cited in Note 4, including

Pittsburg, etc. Co. v. Keokuk, etc. Bridge Co.,
155 U. S., 156;

Baily v. Hannibal, etc. R. Co., 17 Wall., 96;

Telfer v. Russ, 60 Fed., 224;

Thompson v. Beal, 48 Fed., 614;

Woodwards v. Jewell, 25 Fed., 689;

Lamb v. Davenport, 1 Sawy., 609;

Wildman v. Taylor, Fed. Cas. No. 17,654.

It is respectfully submitted that the decision of this case amounts to a miscarriage of justice, and that if the so-called new bond be read and considered in connection with the other written evidences of the inten-

tion of the parties, it should not be held to be an independent contract of insurance.

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This is to certify that in my judgment the foregoing petition for rehearing is well founded and it is not interposed for delay.

W. H. METSON,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OLMSTED-STEVENSON COMPANY, a Corporation,
Petitioner,
vs.
R. S. MILLER, Bankrupt,
Respondent.

In the Matter of R. S. MILLER, Bankrupt.

Petition for Revision

**Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, of a Certain
Order of the United States District Court
for the District of Montana.**

Filed

OCT 15 1915

F. D. Monckton,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

In the Matter of R. S. MILLER,

A Bankrupt.

**Petition for Review and Revision of Order of
District Court.**

PETITION FOR REVIEW AND REVISION OF
ORDER OF DISTRICT COURT REFUS-
ING TO OPEN THE ABOVE PROCEED-
ING AND TO COMPEL THE BANKRUPT
TO AMEND HIS SCHEDULE OF ASSETS.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of Olmsted-Stevenson Company, a
corporation, organized and existing under the laws
of the State of Montana, respectfully shows:

I.

That on or about the 5th day of February, 1914,
the above bankrupt, R. S. Miller, voluntarily filed
his petition in bankruptcy in the District Court of
the United States in and for the District of Mon-
tana, together with schedules of his debts, assets and
property.

II.

That thereafter, by order of the said Court, duly
made and given, the said R. S. Miller, was adjudged
a bankrupt, and subsequently surrendered to said
Court certain property, which he claimed to be all
the property not exempt under the laws of the State
of Montana, of which he was the owner at the time
said petition was filed.

III.

That thereafter, and in the month of April, 1914, the said R. S. Miller was discharged from bankruptcy by the order of said District Court of the United States in and for the District of Montana.

That your petitioner was recognized as a creditor of said R. S. Miller, bankrupt, and its name inserted in the schedule of creditors and said schedule further shows that there was due to your petitioner from said bankrupt, R. S. Miller, at the time of the filing of said schedule, the sum of Nine Hundred and Sixty-five and 30/100 (\$965.30) dollars.

That the trustee in bankruptcy of the said bankrupt, R. S. Miller, has accepted proof of your petitioner's claim against the estate of R. S. Miller, bankrupt, in the sum of Nine Hundred and Sixty-five and 30/100 (\$965.30) dollars.

IV.

That thereafter and early in the month of October, 1914, your petitioner filed in the above-entitled cause in said District Court of the United States, in and for the District of Montana, its duly verified petition asking that the bankruptcy proceedings herein be opened, and that the bankrupt, R. S. Miller, be ordered and compelled to file an amended schedule of his assets and property, which petition, (omitting the heading and formal parts thereof), was as follows:

**Petition to Open Bankruptcy Proceedings and Com-
pel Bankrupt to Amend His Schedule of Assets
and Property.**

**PETITION TO OPEN BANKRUPTCY PRO-
CEEDINGS AND COMPEL THE BANK-
RUPT TO AMEND HIS SCHEDULE OF
ASSETS AND PROPERTY.**

“To the Honorable Court Aforesaid:

Comes now the Olmsted-Stevenson Company, a
corporation, and respectfully shows to the Court:

I.

That said Olmsted-Stevenson Company, during all
the times hereinafter mentioned, has been and still
is a corporation, organized, created and existing un-
der and by virtue of the laws of the State of Mon-
tana and engaged in the mercantile business, with
its principal place of business at Dillon, Beaverhead
County, Montana.

II.

That on the 5th day of February, 1914, the above-
named bankrupt, R. S. Miller, voluntarily filed his
petition in bankruptcy in this Court, together with
the schedules of his debts, assets and property.

III.

That thereafter, by an order of said Court, duly
made and given, said R. S. Miller, was adjudged a
bankrupt and subsequently thereto surrendered to
said Court, certain property, which he claimed to
be all of the property not exempt under the laws of
the State of Montana, of which he was the owner
at the time said petition was filed.

IV.

That in the schedule of debts owing by said bankrupt, as filed in this court, on the said 5th day of February, 1914, was included as one of his creditors, your petitioner, the Olmsted-Stevenson Company, a corporation, and it was alleged in said schedule that the amount of indebtedness due from said bankrupt, to said Olmsted-Stevenson Company, was the sum of Nine Hundred Sixty-five and 30/100 Dollars (\$965.30).

V.

That thereafter and within the time allowed by law, said Olmsted-Stevenson Company, duly proved its claim and caused the same to be filed in said estate and that said claim as proved and filed was of the amount of Nine Hundred and Sixty-five and 30/100 Dollars (\$965.30).

VI.

That thereafter and on the 18th day of September, 1914, a dividend was paid out of the assets of said estate of said bankrupt and your petitioner, the Olmsted-Stevenson Company, received the sum of Nine and 65/100 dollars (\$9.65) which was by it duly credited upon its proved claim, and after such credit was allowed there remained and still remains due from said bankrupt to the said Olmsted-Stevenson Company, the sum of Nine Hundred Fifty-five and 65/100 Dollars (\$955.65).

VII.

That accompanying said bankrupt's petition in bankruptcy, was a schedule of said bankrupt's assets, but said schedule omitted therefrom, a crop of

wheat, which had theretofore been seeded upon and was then growing upon the lands of said R. S. Miller, and which had been planted and seeded between the month of August, 1913, and the date of the filing of said petition, and which said crop of wheat then growing upon said land of said R. S. Miller has, since the filing of said petition, matured, been harvested and threshed and said crop yielded approximately one thousand bushels of wheat, of the value of approximately Nine Hundred Dollars (\$900.00).

VIII.

That the said bankrupt failed and neglected to include said growing crop of wheat in said schedule of the property owned by him and that said crop of wheat should have been included therein and he should have shown the same to be of the value of Nine Hundred Dollars (\$900.00).

IX.

That no part of said crop of wheat and no part of the value thereof was ever administered in said estate for the benefit of the creditors and that said property should have been included in said schedule and thereafter administered in said estate and dividends paid to the respective creditors, whose claims were proved, out of the amount realized from the sale of said crop.

X.

That your petitioner is informed and believes and therefore alleges that on or about the——day of April, 1914, by an order duly made and given, in the above-entitled court, said R. S. Miller was discharged in bankruptcy and your petitioner further

avers that at the time of said discharge, said estate of said bankrupt had not been fully administered and there remained to be administered the said crop of said wheat of the value of aforesaid and that since said date and prior to the date of the filing of this petition, said property has not been surrendered by said R. S. Miller to the trustee in bankruptcy or the referee in bankruptcy, for the benefit of the creditors and said R. S. Miller has wrongfully retained said property for his own use and benefit and failed and neglected to surrender the same or any part thereof to the said estate, for the benefit of the creditors of said R. S. Miller, bankrupt.

XI.

That at the time of filing the schedule of property owned by him, as aforesaid, and at all times thereafter, the said R. S. Miller, knowingly, and fraudulently, concealed said property, and knowingly and fraudulently failed and neglected to include the same in the schedule of property filed by him, and failed to surrender the same for the benefit of his creditors, and that said property was not delivered up or surrendered by said Miller, for the use or benefit of said creditors.

XII.

That neither your petitioner, nor any of its officers or employees had knowledge of the failure of said R. S. Miller to include said crop in his schedule of property until on or about the 18th day of September, 1914, upon which date your petitioner received the aforesaid dividend and thereafter instituted investigation to ascertain whether said Miller had sur-

rendered all of his property to the trustee in bankruptcy and all of the property which said creditors were entitled to have administered in said estate, and thereupon learned that said crop of wheat, harvested and threshed as aforesaid, had not been included as assets of said Miller, in his schedule, or administered in said bankrupt's estate and shortly thereafter your petitioner prepared an application to have said schedule amended so as to include said crop of grain and subsequently ascertained by an order duly made and given, said Miller was discharged in bankruptcy on or about the——day of April, 1914, and that said application so to amend said schedule could not be filed until said matter was by an order of said Court opened and leave therefor obtained.

WHEREFORE, your petitioner prays that said matter be reopened and that said Miller be required to amend his schedule of property owned by him at the time of filing his petition in bankruptcy, so as to include said crop of wheat and that said Miller be required to deliver up said crop of wheat or any thereof, which is in his possession, to a trustee in bankruptcy to be appointed by said court for that purpose, and in the event that any of said wheat has been disposed of or appropriated to the use of said Miller, that he be required to account for and pay to the trustee in bankruptcy, the value thereof and that said property be administered in said estate as if it had been included in said schedule when the same was filed and for such other and further relief as to

the Court may seem proper and just.

OLMSTED-STEVENSON COMPANY,

A Corporation,

By B. N. STEVENSON,

Its Secretary-Treasurer.

(Duly verified).”

V.

That thereafter and on or about the 29th day of October, 1914, Frank W. Haskins, the duly appointed, qualified and acting Referee in bankruptcy, in said District Court of Montana, regularly made his order requiring the said bankrupt to appear before him, as such Referee, on the 7th day of November, 1914, at 2 o'clock in the afternoon of said day, to show cause, if any he had, why said bankruptcy proceedings should not be opened and the said bankrupt required to file an amended schedule of his said assets and property, which said order of said Referee, (omitting the heading and formal parts thereof), was as follows:

**Order of Referee, etc., in Bankruptcy Directing
Bankrupt to Show Cause Why He Should not be
Required to File an Amended Schedule.**

“Whereas, the Olmsted-Stevenson Company, a corporation, has filed herein a petition alleging that the above-named bankrupt has concealed certain assets and not included the same in his schedule filed herein, and asks that the said case be reopened and the bankrupt required to amend the schedule to include a crop of wheat which is alleged to be in his possession, and to be required

to deliver the same over to the Trustee in bankruptcy.

It is therefore ordered that the said bankrupt, R. S. Miller, be, and he is hereby required to be and appear before the undersigned Referee, 16 West Broadway, Butte, Montana, on the 7th day of November, A. D., 1914, at two o'clock in the afternoon, then and there to show cause, if any he has, why he should not be required to file an amended schedule to include said property so alleged to have been withheld, and further to deliver the same to the Trustee in bankruptcy herein.

It is further ordered, that service of this order be made by the mailing of a copy of this order to the Attorney for said bankrupt Henry G. Rodgers, Esq., and also a copy of said order to the attorneys for said company, the Olmsted-Stevenson Company, to wit, Norris, Hurd & Smith; that such copies be enclosed within return and penalty envelopes, addressed to said attorneys at Dillon, Montana.

Dated Oct. 29, 1914.

FRANK W. HASKINS,
Referee in Bankruptcy."

VI.

That on or about the 7th day of November, 1914, the said bankrupt, R. S. Miller, appeared before said Referee and filed in said bankruptcy proceedings, in said District Court of the United States, in and for the District of Montana, his answer to said petition of your petitioners, which answer, (omitting

the heading and formal parts thereof), was as follows:

[Answer.]

“Now comes the above-named bankrupt, R. S. Miller, and for answer to the petition of Olmsted-Stevenson Company, a corporation, admits, denies and alleges:

First.

Admits the allegations set out and contained in the first paragraph of said petition.

Second.

Admits the allegations set out and contained in paragraph second of said petition.

Third.

Replying to paragraph three of said petition, admits that thereafter, by order of said Court, duly made and given, he was adjudged a bankrupt and subsequently thereto surrendered to said Court, certain property which he claimed to be all of the property not exempt under the laws of the State of Montana, and the United States, of which he was the owner at the time said petition was filed, and at the time he was adjudicated a bankrupt as aforesaid.

Fourth.

Admits the allegations set out and contained in paragraph four of said petition.

Fifth.

Admits the allegations set out and contained in paragraph five of said petition.

Sixth.

Admits the allegations set out and contained in paragraph six of said petition.

Seven.

Denies each and every allegation set out and contained in paragraph seven of said petition, except that this answering bankrupt admits that at the time he filed his petition in bankruptcy and at the time he was adjudged a bankrupt, that there had theretofore been seeded during the summer and fall of 1913, a crop of winter wheat, and said crop so planted was at said times in the ground upon lands occupied by this bankrupt as a homestead entry under the homestead laws of the United States, but that upon the date of the filing of said petition and upon the date of the adjudication of bankruptcy, final proof had not been made upon said land so held under a homestead entry as aforesaid or any part thereof; that said crop was harvested and threshed sometime after the 1st day of July, 1914, and that said crop yielded approximately Nine Hundred and Eighty-seven bushels of wheat, of the value of approximately Eight Hundred and Thirty-eight and 95/100 Dollars.

Eighth.

Denies each and every allegation set out and contained in paragraph eight of said petition.

Ninth.

Denies each and every allegation set out and contained in paragraph nine of said petition, except that it is admitted that no part of the crop of wheat planted upon the lands occupied under a homestead entry as aforesaid was ever administered in said estate for the benefit of creditors.

Tenth.

Denies each and every allegation set out and con-

tained in the tenth paragraph of said petition, except that it is admitted that on the 20th day of April, 1914, by an order duly made and given in the above-entitled court, this bankrupt was discharged in bankruptcy; that the estate of this bankrupt at the time of said discharge had not been fully administered, and it is further admitted that said crop has not been surrendered to the Trustee in bankruptcy or the Referee in bankruptcy for the benefit of creditors.

Eleventh.

Denies each and every allegation set out and contained in paragraph eleven of said petition, except that it is admitted said crop has not been surrendered for the benefit of creditors.

Twelfth.

Denies each and every allegation set out and contained in paragraph twelve of said petition.

Further answering said petition on file herein, and as an affirmative defense thereto, this bankrupt avers:

First.

That said Olmsted-Stevenson Company, during all the times herein mentioned, has been and still is, a corporation organized, created and existing under and by virtue of the laws of the State of Montana, and engaged in the mercantile business, with its principal place of business at Dillon, Beaverhead County, Montana, and that at all of said times, B. N. Stevenson was the secretary-treasurer of said corporation and Jos. C. Smith was one of the attorneys for said corporation, representing its interest as a creditor of this bankrupt.

Second.

That on the 5th day of February, A. D. 1914, this bankrupt voluntarily filed his petition in bankruptcy in this court, together with the schedules of his debts, assets and property, and upon said date was adjudicated a bankrupt.

Third.

That thereafter, on the 4th day of March, A. D. 1914, one Charles W. Conger was appointed trustee of the estate of this bankrupt, and that thereafter the said Charles W. Conger duly qualified and entered upon the discharge of his duties as such Trustee, and upon the 31st day of March, A. D. 1914, said Trustee duly made an order setting apart to this bankrupt his exempt property under the laws of the State of Montana and the laws of the United States, including among other property, said real estate so held under said homestead entry as aforesaid, and that thereafter on the 20th day of April, A. D. 1914, an order was duly made and given, discharging this bankrupt.

Fourth.

That in schedule A, accompanying and being a part of this bankrupt's petition in bankruptcy, said schedule giving and containing a statement of all creditors whose claims are and were unsecured, there was entered and set forth the claim of the said Olmsted-Stevenson Company, the petitioning creditor herein, in the manner required by law.

Fifth.

That in schedule B (1), being a statement of all real estate belonging to said bankrupt, which said

schedule was a part of and accompanied the said petition of this bankrupt, was set forth and contained certain real estate situated in Beaverhead County, State of Montana, held and occupied by this bankrupt under a homestead entry made September 28th, 1910, under the laws of the United States, upon which said homestead entry, at the time of the filing of said petition and the adjudication of this bankrupt as a bankrupt, final proof had not been made; and that in schedule B (5), being a particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, was entered, set forth and contained said real estate so held and occupied under said homestead entry as aforesaid.

Sixth.

That at the time of the preparation of this bankrupt's petition and schedules, and that at the time of the filing thereof, and at the time of the adjudication of bankruptcy therein, there was upon said real estate, so held and occupied under said homestead entry as aforesaid, winter wheat seeded the Fall before, which said wheat would not mature until during the season of 1914, and that at all of the said times said bankrupt honestly believed and ever since has honestly believed up until after the filing of said petition by said petitioning creditor, that said crop sown upon said lands as aforesaid was a part and parcel of said real estate and that at the time of the preparation of said petition and schedules, he stated to his attorneys that said crop so upon said lands was in his possession as aforesaid,

and was informed and advised by them that said crop was a part of said real estate and that it was not necessary or required that said crop be listed separately in said schedules; that at the time of the filing of this bankrupt's petition in bankruptcy and his adjudication as such, the petitioning creditor herein, Olmsted-Stevenson Company, knew and ever since has known, that this bankrupt was at all times until after the harvesting of said crop, in the open, notorious and well-known possession of, and at all times claimed to be, the owner of said crop.

Seventh.

That at the time of the filing of this bankrupt's petition and schedules, and at the time of his adjudication as a bankrupt therein, the said petitioner, Olmsted-Stevenson Company, and its agents and servants knew and ever since have known, that said crop was upon said lands and that this bankrupt owned and was in possession of said crop, and that the said Charles W. Conger, after his appointment and qualification as Trustee herein as aforesaid, and prior to the making of an order by the said Trustee, setting apart to this bankrupt his exemptions and prior to the date upon which this bankrupt was discharged as aforesaid, well knew that said crop was upon said lands and premises as aforesaid, and that this bankrupt claimed to be and was the owner thereof, and that this bankrupt, after the appointment and qualification of said Trustee and before the order setting apart to this bankrupt his exemptions, told said Trustee that said crop was upon said lands and that he, the said bankrupt, was the owner there-

of, and that said Trustee before making said order as aforesaid, considered said matter and consulted with the said Olmsted-Stevenson Company, its agents, attorneys and servants, and was advised by the attorney for the said Olmsted-Stevenson Company that said crop was a part and portion of said real estate, and as such, belonged to this bankrupt, and that said trustee thereupon told the attorney for this bankrupt that said crop was a part of and admitted to be a part of said real estate, and as such exempt to said bankrupt, and that he would make an order setting apart to this bankrupt said real estate as exempt.

Eighth.

That this bankrupt honestly and truly believing that said crop was a part of said real estate, and as such was not entitled to be administered by said Trustee for the benefit of said bankrupt's creditors herein, remained in possession of said crop, took care of harvesting and threshing said crop and expended large amounts in taking care of, harvesting and threshing said crop in work, labor, materials and moneys expended; that since the threshing of said crop, honestly and in good faith believing that said crop was not entitled to be administered for the benefit of his creditors herein, has sold and disposed of a large proportion of said crop and has laid out and expended the proceeds thereof, and has not now in his possession, nor could he, if required to do so, now surrender a portion of said crop, sold as aforesaid, to said Trustee to be administered.

Ninth.

That the said petitioning creditor herein, with full knowledge of all the facts in this case as aforesaid, consented, advised and knowingly permitted the said Trustee to proceed with the administration of said estate and set aside to this bankrupt his exemptions including the real estate upon which said crop was growing, and to permit this bankrupt in good faith to expend his labor, time, material and money in taking care of harvesting and marketing said crop, and that by reason thereof, said petitioning creditor now is estopped from claiming or requiring this bankrupt to surrender said crop or to surrender the proceeds of said crop in order that the same may be administered and distributed to this bankrupt's creditors herein.

Tenth.

That the reasonable value of the work, services, materials furnished, money expended by said bankrupt, and the value of the use of the lands upon which said crop was grown, since the 5th day of February, 1914, the time his petition in bankruptcy was filed, in raising, maturing, harvesting, threshing and caring for said crop, amounted in the aggregate to the sum of \$525.33 or thereabouts.

Eleventh.

That at the time of the filing of the petition of this bankrupt herein on said 5th day of February, 1914, and at the time of the adjudication of his bankruptcy, said crop was exempt from execution because being grown upon land which was exempt and claimed as exempt by said bankrupt and could

not be attached, or levied upon, or seized or appropriated for the payment of his debts or any of them, and that said bankrupt always considered and claimed the same as exempt as hereinbefore set out, said bankrupt considering the same as exempt as a part of said real estate up until after the filing of the petition of the petitioning creditor herein; that after the filing of said petition of said petitioning creditor herein, he was informed that said crop under the bankruptcy laws of the United States was not considered as a part of the real estate, but that the same was exempt as growing and unmaturred crop at the time of the filing of his petition in bankruptcy herein, and at the time he was adjudicated a bankrupt in said proceeding in bankruptcy by the Court, and that he claims the same as exempt and as a part of his exemptions and has always made such claim as to said crop in good faith and as an exemption allowed him by the laws of the State of Montana and of the United States; that said crop was growing at the time of the filing of said petition in bankruptcy and at the time he was adjudicated a bankrupt upon a homestead entry for which final proof had not been made as hereinbefore set out, and that such land upon which said crop was growing was exempt and that the growing crop thereupon was also exempt.

WHEREFORE, this petitioner prays that it be ordered and adjudged that the petitioning creditor herein is estopped and has waived all its rights to object to the failure of this bankrupt to include in said schedules or any of said schedules said crop, and

is estopped and has waived its right to have said crop administered in said bankruptcy proceeding, and is estopped to insist and has waived its right to claim that said crop was and is an asset of said estate and not a portion of said real estate, or to insist that said crop is and was not exempt.

2. That if the Court should hold under the facts and circumstances in this case, that said bankrupt should be required to amend his schedule of assets, that an order be made giving this bankrupt leave to also amend his schedule, setting for his exemptions by including therein his said crop, and that the said crop be set apart to this bankrupt as exempt.

3. Said bankrupt without waiving any of his objections to said petition of said petitioning creditor and without waiving his right to claim that said crop is and was exempt, and reserving the same and all of said objections and also reserving his right to amend said schedules by claiming said exemption as hereinbefore set out, prays that in the event that it should be determined that under the facts in this case, said crop should be administered for the benefit of creditors herein, that an order be made that this bankrupt be reimbursed for the amount expended in labor, work, materials and supplies furnished by him in raising, cultivating, harvesting, threshing, marketing and caring for said crop, and for the rental value of the ground upon which said crop was raised, matured, threshed, harvested and cared for from the 5th day of February, A. D. 1914, the date upon which his petition in bankruptcy was filed herein, amounting in the aggregate to the sum of \$525.00 or there-

abouts. Said bankrupt also prays for his costs herein expended and for such other and further relief as may be meet and proper.

R. S. MILLER,

Bankrupt.

H. W. RODGERS and H. G. RODGERS,

Attorneys for Bankrupt.

(Duly Verified)."

[Opinion of Referee in Bankruptcy.]

VII.

That a hearing was had upon said petition and answer, and that after said hearing, and on or about the 31st day of December, 1914, the said Frank W. Haskins, Referee in bankruptcy for the District of Montana, rendered and filed his opinion upon said hearing which, (omitting the heading and formal parts thereof), was as follows:

"This matter came on for hearing upon the 7th day of November, 1914, upon the petition of the Olmsted-Stevenson Company, a corporation, to require the bankrupt to amend his schedules herein and account for a certain crop of wheat, and an order to show cause thereupon issued. At the conclusion of the introduction of the testimony counsel for the respective parties, Messrs. Jos. C. Smith, and Rodgers and Rodgers were given time to present briefs upon the matters involved.

The bankrupt herein, R. S. Miller, was so adjudicated upon the 7th day of February, 1914, upon a voluntary petition filed by him February 5th, 1914.

At the time of the filing of his petition and

schedules herein among other property the bankrupt had a homestead, not then patented, upon which he was residing, described as follows: Lots one and two, Section nineteen, Township 7 South Range 7 West; the Northeast quarter and the east half of the Northwest quarter of Section twenty-four, Township 7 South Range 8 West Montana Meridian.

There was a lot of personal property mostly claimed as exempt and which in due time the trustee, C. W. Conger, set aside as exempt, with some few exceptions. To his report thus filed, exception was taken by the bankrupt and the referee finally determined same in favor of the bankrupt. However, at the time of filing his petition, the bankrupt had upon the homestead above-described, which has been set apart as exempt, about 50 to 52 acres of Turkey red fall wheat, which had been planted in September, 1913. No mention was made in the schedule of bankrupt anywhere concerning this growing crop. The testimony is that the homestead being exempt, this was considered a part of the real estate and hence no mention of it in the schedule. The bankrupt advised his attorneys of the situation at the time and was told by them that it was a part of the real estate, and did not need to be scheduled. The Trustee upon his selection, qualification and administration of the estate herein was likewise so advised by attorneys. Thereafter the petitioner Olmsted-Stevenson Company filed their petition to have

it included in the schedule. This is now the matter for determination. I am of the opinion that no fraud was intended by the bankrupt. He was honest in the preparation of his schedules.

When harvested this land returned 987 bushels of this wheat. Some of it has been disposed of and the bankrupt thought upon his examination there was approximately 600 bushels on hand yet. The bankrupt claims he is entitled to \$525.33 for the rental of the land and for his expenses in connection with the raising and harvesting of the crop. Counsel for petitioner contends that the sums asked are greatly exaggerated. It may be true, but no other evidence upon the question was offered, save that of the bankrupt, and the referee must have something to base his estimates upon. His only measure here is the testimony of the bankrupt. He says he is entitled to expenses in the sum of \$325.33. The Referee is not prepared to say that these figures are excessive and the further sum of two hundred dollars so far as I am advised is not unreasonable, for the rental of the land, or for its use, when considered in the light of the testimony given here.

Under the circumstances herein I do not find the petitioner is guilty of laches. The bankrupt should have either scheduled the crop, or have asked leave to amend, if he thought there might be a question concerning it. As he has about six hundred bushels of this wheat on hand,

or had at the time of the hearing, I can see no reason for entering into a discussion as to his ability to comply herein with any order made. He should file an amended schedule showing this crop and let him set forth the exact amount he now has on hand. Out of that he has disposed of he is entitled to reimbursement in the amount above mentioned. If he has not received enough from that disposed of to compensate him as herein indicated, upon the disposition of the balance he may be reimbursed for the difference.

I have reached this conclusion from the cases following:

In re Coffman, 93 Fed. 422.

In re Daubner, 96 Fed. 805.

In re Hoag, 97 Fed. 543.

In re Barrow, 98 Fed. 582.

I have given the matter much consideration and from the evidence submitted and the authorities I can reach no other conclusion.

An order may be granted granting the petition requiring bankrupt to amend and allowing him the compensation and expenses herein set out, out of such wheat as he may have disposed of, or if he has not disposed of enough for that purpose he may file his petition for the balance. The wheat being in his possession he must accurately describe the amount now on hand and deliver the same over to the trustee. The petitioner may be allowed his costs, and his services having been beneficial to the estate he may be also allowed a reasonable attorney's fee to be

fixed and allowed upon the presentation of his petition therefor.

Dated the 31st day of December, 1914.

FRANK W. HASKINS,
Referee in Bankruptcy."

VIII.

That thereafter and on or about the 13th day of January, 1915, the said R. S. Miller, bankrupt, filed in the District Court of the United States, for the District of Montana his certain petition for the review and revision of said order of said Frank W. Haskins, Referee in bankruptcy, duly made and entered on the 31st day of December, 1914, as above stated, which said petition, (omitting the heading and formal parts thereof), was as follows:

**[Petition of Bankrupt for Review and Revision of
Order of Referee in Bankruptcy.]**

"Your petitioner respectfully shows: That your petitioner was adjudicated a bankrupt on the 7th day of February, 1914, upon a voluntary petition filed upon the 5th day of February, 1914; that upon the 7th day of November, 1914, a hearing was had upon the petition of the Olmsted-Stevenson Co., a corporation, one of the creditors herein, said petition having been heretofore filed on the 28th day of October, 1914, to require this bankrupt to amend his schedules herein, and account for a certain crop of wheat and to surrender said crop to the Trustee, and an order to show cause thereupon issued; that on the 31st day of December, A. D. 1914, an order, a copy of which is hereto annexed, was made and entered herein; that said order was and is erroneous in that:

I.

That said order is contrary to law and is contrary to the evidence herein, in that the evidence shows without contradiction that said crop of wheat at the time the bankrupt filed his petition in bankruptcy and at the time he was adjudicated a bankrupt, was growing upon said lands held by said bankrupt under and by virtue of a homestead filing and that said bankrupt had not at said times or either of said times made final proof upon said homestead and that said crop of wheat was not at said time or either of said times, subject to execution or could said crop have been levied upon of Writ of Attachment or Execution.

2.

That said crop was on the date upon which this bankrupt filed his petition herein and on the date upon which he was adjudicated, exempt from execution under the laws of the State of Montana.

3.

That said crop was on the date upon which this bankrupt filed his petition herein and on the date he was adjudicated a bankrupt, exempt from execution under the laws of the United States.

4.

That the evidence is insufficient to justify said order requiring said bankrupt to amend his schedule and to account for and deliver said crop of wheat to the Trustee in bankruptcy and this, to wit: There is no evidence to show that said crop of wheat was a part of the bankrupt's estate, which could or should pass to the Trustee in bankruptcy.

5.

The uncontradicted evidence showed that said crop of wheat was exempt at the time said bankrupt filed his petition in bankruptcy and was adjudicated a bankrupt.

6.

That the evidence shows that the petitioning creditor Olmsted-Stevenson Company, was guilty of laches which would prevent its prevailing herein.

7.

That the evidence shows conclusively and without substantial contradiction that the petitioning creditor herein had full knowledge that said crop of wheat was not scheduled separately for many months prior to the time that it filed this petition herein and that it acquiesced in said crop of wheat being not scheduled separately and in the claim that the same was exempt as a part of the land and therefore is estopped to claim that the same should be accounted for or delivered to the Trustee in bankruptcy.

8.

That the uncontradicted evidence establishes that the Trustee in bankruptcy had full knowledge that such crop of wheat was not scheduled separately and and was claimed as exempt by the bankrupt prior to the 1st day of April, 1914, the date upon which said Trustee set apart to the bankrupt his exemptions and acquiesced in said claim of exemption and that the petitioning creditor is bound by such knowledge and conduct of said Trustee in bankruptcy, and is therefore estopped to ask that said crop of wheat be accounted for and delivered to said Trustee in bankruptcy.

WHEREFORE, your petitioner, feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XVII.

Dated this 13th day of January, A. D. 1915.

R. S. MILLER,
Petitioner.

H. W. RODGERS, and
H. G. RODGERS,
Attorneys for Petitioner.

(Duly verified.)”

(Copy of opinion and order of Referee attached to said petition is in the same words and figures as said order above set forth in Paragraph V of this petition.)

IX.

That thereafter and on or about the —— day of January, 1915, your petitioner filed in the District Court of the United States for the District of Montana, its objections to the granting of the petition of bankrupt, R. S. Miller, for a review of the decision of Frank W. Haskins, Referee in bankruptcy, made and entered on the 31st day of December, 1914, which objections (omitting the heading and formal parts thereof), were as follows:

[Objections to Granting of Petition of Bankrupt for Review of Decision of Referee in Bankruptcy.]

“Comes now the Olmsted-Stevenson Company, a corporation, petitioning creditor herein, and objects to the granting of the petition of the bankrupt for a review of the decision of Honorable Frank W. Haskins, Referee in bankruptcy,

made and rendered herein, on the 31st day of December, 1914, and admits that said bankrupt was adjudicated a bankrupt on February 7th, 1914; that a hearing was had upon the petition of this petitioner, upon November 7th, 1914; that said petition had theretofore been filed on October 28th, 1914, asking that said bankrupt be required to amend his schedule herein; that an order to show cause was issued in said matter, and that a decision in said matter was rendered by Honorable Frank W. Haskins, Referee in bankruptcy, on December 31st, 1914, and denies each and every other allegation, fact, matter and thing, set forth and contained in said petition for review.

OLMSTED-STEVENSON COMPANY,

Petitioner.

JOS. C. SMITH,

Attorney for Petitioner.

(Duly verified.) "

IX¹/₂.

That said matter of said review came on for hearing before said District Court of the United States, in and for the District of Montana, upon the papers and proceedings hereinabove set forth, and the said District Court of the United States, in and for the District of Montana, reversed the said order so made by the said Frank W. Haskins, Referee in bankruptcy for said District Court of Montana, and rendered and filed a written opinion upon said reversal, which opinion is in the words and figures following:

[Opinion of U. S. District Court.]

“BOURQUIN, District Judge. In February, 1914, Miller was adjudicated a voluntary bankrupt. He then was in occupancy of a homestead upon public lands of the United States, and thereon had 50 acres in winter wheat. The former was scheduled, but the latter not, though he disclosed it at the first meeting of creditors. The trustee had knowledge of the wheat, but on advice assumed it followed the land, which latter was set off as exempt in April, 1914. In due time Miller reaped the crop, 987 bushels. A creditor then petitioned to compel the bankrupt to schedule the wheat, and, after hearing, the referee so ordered, subject to certain allowances to the bankrupt for rent of the land and his other expenses in making the crop. The bankrupt asks review.

The Referee's order conforms to *In re Daubner* (D. C.), 96 Fed. 805, but it is believed the law is otherwise. Analogous cases are *In re Coffman* (D. C.), 93 Fed. 422; *In re Hoag* (D. C.), 97 Fed. 543; *In re Barrow* (D. C.), 98 Fed. 582; *In re Sullivan* (D. C.), 142 Fed. 620; *Id.*, 148 Fed. 815, 78 C. C. A. 505. This growing crop of wheat, when the bankruptcy petition was filed, was not property of the character that vests in the trustee. The latter is only property not exempt, and which the bankrupt 'could by any means have transferred or which might have been levied upon and sold under judicial process.' Bankruptcy Act, Sec. 70. This im-

ports property capable of change of ownership and enjoyment, without recourse to or drafts upon property and labor of the bankrupt, which are not part of the estate in bankruptcy, and upon which creditors have no claim subsequent to adjudication.

It will be noted the land upon which the wheat was growing was held by the bankrupt subject to performance by him of conditions precedent of his contract to purchase from the United States. It was a personal contract analogous to a personal privilege, not assignable, and not subject to execution, and which he could at any time abandon, and thereby extinguish. His property in the land was exempt, not by state law, but from its nature. Even when title is secured, by federal law the land is not liable for debts incurred prior to patent R. S., Sec. 2296 (Comp. St. 1913, sec. 4551.) When the bankruptcy petition was filed, this crop of wheat had no separate existence. It was in the nature of an incident that followed the land. Its value was potential only—that might be created by the land and future labor. Of itself, it had no transfer value. It could be transferred only in connection with a transfer of occupancy, use, and literal consumption of the land to bring to it maturity. Such a qualified transferable quality is not that of Section 70, *supra*.

Nor was this crop then subject to levy and sale, if for no other reason, because otherwise the owner thereby might be prevented from per-

forming the conditions precedent, of which was cultivation to crop, of his contract with the United States, and he might abandon, relinquish or forfeit the land, whereupon land and crop would be property of the United States, to the great injury of the owner, and without benefit to the levying creditor, and to the loss of the contract to the United States. Furthermore, levy and sale could not confer right to oust the owner from the exclusive possession and use secured to homestead entrymen of public lands. After such levy and sale the crop would necessarily demand the bankrupt's land and labor to mature and sever.

But the land was always exempt, and the fruits of its labor likewise, after bankruptcy petition filed. It will not do to concede payment out of the crop for such of the bankrupt's land and labor. The Bankruptcy Act does not authorize either to be commandeered; and if the crop failed or was destroyed at harvest, from where would come this payment? The bankrupt having right to exclusive use of his homestead land, no levy and sale could prevent him from lawfully replowing and reseeding the land after his bankruptcy petition was filed. To property of this evanescent quality no levy could attach. The case is distinguishable from those wherein it has been held that growing crops are so far personal property that though upon lands exempt by state law, they are subject to levy and sale; for in these latter the personal obligation of the owner of the land continues until

after the crop is matured and severed, and the creditor, until paid, has claims upon the fruits of his debtor's exempt land and labor. In bankruptcy it is otherwise. The debtor's personal obligation is distinguished at adjudication, and thereupon his exempt and after-acquired property are free from creditors' claims though never paid. To the argument of possible injustice, in that a homestead entryman might devote such labor and money to put much land to crop, and then invoke bankruptcy between seed-time and harvest, it may be responded. No more than if he erected buildings and fences, cleared, ditched, and broke the land, none of which would inure to the benefit of his estate in bankruptcy.

Another sufficient reason for the conclusion herein is that, by standing by and permitting the bankrupt to devote his time, money, and labor to maturing the crop as his own, the trustee is now estopped to claim it. He made his election. No fraud appearing, it is final, and concludes creditors. The bankrupt assumed all risk and hazard of failure, the Trustee none, and in justice the former is entitled to whatever success was achieved. It goes without saying that, if the crop had failed, this proceeding would not have materialized, and no one would propose compensating the bankrupt for his loss."

The Referee's order is overruled, and thereupon ordered that the decision of said Frank W. Haskins, Referee in bankruptcy, for the District of Mon-

tana, made and entered on the 31st day of December, 1914, be reversed and set aside.

X.

That it was disclosed by the pleadings and proceedings filed and had upon the petition of your petitioner, as hereinbefore set forth, that it was undisputed and conceded that said R. S. Miller, bankrupt, had, at the date of the filing of his voluntary petition in bankruptcy, and at the date of his discharge, owned, and was in possession of a certain crop of winter wheat of about 50 acres, which had theretofore been sown and planted by said R. S. Miller upon certain premises theretofore entered by him as a homestead under the acts of Congress, and upon which final proof and entry had not been made; that said crop was not encumbered and that said R. S. Miller, bankrupt, had not included said crop, or any part of it, in his schedule of property and assets filed in the bankruptcy proceedings, and had never surrendered the same, or any part thereof, to his trustee in bankruptcy.

XI.

That said order of said District Court so made was erroneous as a matter of law in the following respects:

1. In reversing the order made and entered by Honorable Frank W. Haskins, Referee in bankruptcy, in and for the District of Montana, on or about the 31st day of December, 1913, requiring the said R. S. Miller, bankrupt, to amend the schedules of his property and assets, and include therein certain growing crops.

2. In deciding and holding that the bankrupt's crops growing on a homestead (entered and occupied

by the bankrupt under the acts of Congress), at the time of filing his voluntary petition in bankruptcy, were exempt to said bankrupt, under the laws of the State of Montana, or the laws of the United States.

3. In deciding and holding that the bankrupt's crops growing on a homestead (entered and occupied by the bankrupt under the acts of Congress), at the time of filing his voluntary petition in bankruptcy, do not pass to his Trustee in bankruptcy for the benefit of his creditors.

4. In holding and deciding that the Trustee in bankruptcy of R. S. Miller, bankrupt, was guilty of laches in not taking steps requiring said bankrupt to insert in his schedules of assets and property the said growing crop.

5. In holding that your petitioner could not obtain the relief asked for in its original petition because of laches.

6. In holding and deciding that any laches existed whereby relief could not be granted, as prayed for in your petitioner's original petition.

That each and all of said points and reasons above set forth were raised and argued before the District Court of the United States, in and for the District of Montana.

WHEREFORE, your petitioner prays that the order of the District Court of the United States for the District of Montana, reversing the said order and decision of the said Frank W. Haskins, Referee in bankruptcy, for said District of Montana, made and entered on the 31st day of December, 1913, be revised and reviewed in a matter of law by this Honor-

able Court, as provided by Section 24B of the Bankruptcy Act of 1898, and the rules and practice thereunder in such cases made and provided, and that said order of said District Court so reversing the said order of said Frank W. Haskins, Referee in bankruptcy, in and for the District of Montana, be set aside and held for naught, with such directions to the District Court of the United States, for the District of Montana, as to this Court may seem proper.

JNO. B. CLAYBERG,
Attorney for Petitioner

State of California,
City and County of San Francisco,—ss.

John B. Clayberg, being first duly sworn, deposes and says; that he is the attorney for the petitioner in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, information and belief.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 21st day of July, 1915.

[Seal] L H. ANDERSON,
Notary Public in and for the City and County of San Francisco, State of California.

**[Acknowledgment of Service of Petition for
Revision.]**

Service of within petition acknowledged this 24th July, 1915.

H. W. RODGERS, and
HENRY G. RODGERS,
Attorneys for Bankrupt.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

Case No. 2628.

OLMSTED-STEVENSON COMPANY, a Corpor-
ation,

Petitioner,

versus

R. S. MILLER, Bankrupt,

Respondent.

Motion to Dismiss [Petition for Revision].

Now comes the above-named respondent and moves this Honorable Court to dismiss the Petition of petitioner on file herein upon the grounds, and for the following reasons, to wit:

First.

That said petition does not state facts sufficient to entitle petitioner to the relief therein prayed, or to any relief.

Second.

That said petition shows upon its face that the ruling of the District Court that a crop growing upon lands held by virtue of a homestead filing, and upon which lands final proof had not been made, do not pass to a Trustee in bankruptcy for the benefit of creditors, is correct.

Third.

That said petition involves questions of fact that cannot be reviewed on petition.

Fourth.

That the question as to whether or not petitioner

could not obtain the relief asked for in its original petition because of laches is a question of fact, and not reviewable by petition.

Fifth.

That said petition does not contain nor is said petition accompanied by a certified transcript of the record and proceedings or record or proceedings in the bankruptcy court of the matter sought to be reviewed herein.

Sixth.

That there has not been filed in the office of the clerk of this court a certified transcript of the record and proceedings or the record or proceedings in the bankruptcy court of the matter sought to be reviewed herein.

Seventh.

That the petition on file herein does not show or pretend to show the facts upon which the District Court held that petitioner could not now be heard to say that said crop should be surrendered for the benefit of creditors.

Respectfully submitted,

HENRY C. RODGERS,

Attorney for Respondent.

[Endorsed]: No. 2628. In the United States Circuit Court of Appeals, for the Ninth Circuit. Olmsted-Stevenson Company, a Corporation, Petitioner, versus R. S. Miller, Bankrupt, Respondent. Motion to Dismiss. Filed Aug. 23, 1915. F. D. Monckton, Clerk.

United States Court of Appeals, for the Ninth Circuit.

OLMSTED-STEVENSON COMPANY,

Plaintiff,

vs.

R. S. MILLER,

Defendant.

In the Matter of R. S. MILLER, a Bankrupt.

Amendment to the Petition.

Now comes Olmsted-Stevenson Company petitioner in the above matter and files this its amendment to its said petition and alleges.

That on or about the — day of —, 1914, in pursuance of the filing of a petition by the said bankrupt to review the decision of the Referee in bankruptcy as alleged in said petition, and in pursuance of the bankrupt act the said Referee in bankruptcy made and filed his certificate returned in the office of a clerk of the United States District Court, District of Montana a certified copy of which certificate in return is hereto attached marked exhibit "A" and hereby made a part hereof.

That and after the said district court of United States District of Montana heard said bankrupt petition for review, upon the testimony returned by said Referee and upon the briefs of the counsel for the respective parties and on the — day of —, 1915, said District Court made an order reversing the order of the said Referee, as alleged in the petitioner's original petition filed in this court. A certified copy of said order is hereto attached

marked exhibit "B" and hereby made a part hereof.

JNO. B. CLAYBERG,
Attorney for the Petitioner.

State of California,
City and County of San Francisco,—ss.

John B. Clayberg, being first duly sworn, deposes and says: That he is the attorney for the petitioner in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true to the best of his knowledge, information and belief.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 9 day of October, 1915.

[Seal] MEREDITH SAWYER,
Deputy Clerk U. S. Circuit Court of Appeals for the
Ninth Circuit.

**[Exhibit "A"—Certificate of Referee in
Bankruptcy.]**

*In the District Court of the United States, for the
District of Montana.*

IN BANKRUPTCY—No. 762.

In the Matter of R. S. MILLER, Bankrupt.
To the Honorable GEO. M. BOURQUIN, District
Judge:

I, the undersigned Referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order, a copy of which is transmitted herewith, was made and entered on the 2d day of January, 1915.

That, on the 14th day of January, 1915, the bank-

rupt, R. S. Miller, feeling aggrieved thereat, filed a petition for review, which is granted.

That the question presented on this review is, Did the Referee err in ordering the bankrupt to amend his schedule to include a growing crop upon the homestead at the time of his filing his petition and schedules to be adjudged a bankrupt?

The following is herewith transmitted to the Court in connection herewith:

The petition and schedules of the bankrupt.

The petition to require bankrupt to amend filed by the creditor, Olmsted-Stevenson Company, a corporation.

The transcript of the evidence taken at the hearing of said petition.

The answer of the bankrupt to the petition to amend,

The Referee's order to amend.

The Referee's findings and conclusions.

The brief submitted by counsel for bankrupt and the brief submitted by counsel for petitioner.

The Trustee's report on exemptions.

The order thereafter made allowing bankrupt additional exemptions.

The petition for review of the Referee's order.

And such other pertinent papers to the question on review.

Dated at Butte, Montana, the 14th day of January, 1915.

FRANK W. HASKINS,

Referee in Bankruptcy.

Filed Jan. 14, 1915. Geo. W. Sproule, Clerk.
By Harry H. Walker, Deputy Clerk.

I, Geo. W. Sproule, Clerk U. S. District Court for the District of Montana, do hereby certify the above to be a true copy of the Referee's Certificate on Review, on file in my office as such clerk.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy.

**Transcript of Testimony Taken Before Referee in
Bankruptcy.**

*In the District Court of the United States, for the
District of Montana.*

No. 762.

Before F. W. HASKINS, Referee in Bankruptcy.
In the Matter of R. S. MILLER, Bankrupt.

HEARING UPON THE PETITION AND
ORDER TO SHOW CAUSE WHY THE
SCHEDULE OF THE BANKRUPT
SHOULD NOT BE AMENDED TO IN-
CLUDE CERTAIN GROWING CROPS AT
THE TIME OF THE FILING OF THE
PETITION IN BANKRUPTCY, AND FOR
AN ORDER DIRECTING HIM TO TURN
OVER THE CROP OF WHEAT OR THE
FUNDS RECEIVED FROM THE SALE OF
SAME TO THE TRUSTEE.

Mr. JOSEPH C. SMITH,
Attorney for Petitioning Creditor Olmsted-Steven-
son Co.

Messrs. HENRY G. and H. W. RODGERS,
Attorneys for Bankrupt.

CHARLOTTE McAULEY,
Stenographer.

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[Testimony of B. W. Stevenson, for Petitioner.]

Mr. B. W. STEVENSON, a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination by Mr. SMITH.

Q. You may state your name.

A. B. W. Stevenson.

Q. What, if any, position do you hold with the Olmsted-Stevenson Company?

A. Secretary and treasurer.

Q. This is a corporation doing business at Dillon, Montana? A. Yes, sir.

Q. Were you, as an officer of that corporation, notified of the fact that R. S. Miller had in February last filed his petition in bankruptcy?

A. I was.

Q. You—the company—Olmsted-Stevenson Company, was notified as a creditor of R. S. Miller of a meeting of creditors? A. Yes, sir.

Q. And you knew that R. S. Miller was going through bankruptcy? I use that expression, it may not be just right. A. Yes, sir.

Q. Now, Mr. Stevenson, did you examine the schedules of property as filed by Mr. Miller?

A. Yes, sir, I did.

Q. And with respect to a certain crop of growing wheat, growing grain I would say, did you have any knowledge on that subject at the time you examined this schedule, as to whether or not the schedule was complete? A. No, sir, I did not.

Q. In other words, did you have any knowledge

(Testimony of B. W. Stevenson.)

that Mr. Miller actually had a crop of growing wheat?

A. Not prior to his discharge in bankruptcy.

Q. You state in your petition that about the 18th of September, on or about the 18th of September, you became apprised of the fact that the bankrupt had matured a crop of wheat which was growing at the time he filed his petition. What have you to say as to that—respecting the time?

A. The date would be approximate more than actual. It was some time before that that I knew of it. It may have been in August some time that I first knew of it.

Q. You would say then that possibly some date in August would be more exact than the 18th of September, but certainly not before the first of August?

A. No.

Q. You didn't know about it prior to that?

A. No, I did not.

Q. Now, Mr. Stevenson, as a credit man and secretary and treasurer for the Olmsted-Stevenson Company, I will ask you if it isn't a fact that you have general knowledge that farmers living in the vicinity of Dillon generally have growing crops of winter wheat; that is dry land farmers?

A. It is presumed they have, but it isn't always the case though that—

Q. You had no special knowledge as to Mr. Miller's crop?

A. I had no personal knowledge as to Mr. Miller's crop, no.

(Testimony of B. W. Stevenson.)

Q. And about what time did you learn of his having matured and threshed a crop of wheat?

A. I heard of the threshing of it—was really the first definite knowledge I had of it—was after the crop was threshed. That was told me by two parties who were there working on the machine, or was there at the time the crop was threshed. I don't know whether they were working or not.

Q. You didn't actually see the crop of wheat yourself? A. Never seen the crop.

Q. You never saw the growing crop?

A. No, sir.

Q. I believe that is the only point I care to examine Mr. Stevenson on.

Cross-examination by Mr. HENRY RODGERS.

Q. Mr. Stevenson, you had a talk with Mr. Miller several times prior to the time he went into bankruptcy relative to the claim your company holds against him? A. Certainly, yes, sir.

Q. Had you discussed with him what property he had?

A. Not in the way of growing crops. I have relative to the chattels he had.

Q. Did he tell you at any time that he had a winter crop of wheat? A. No, sir.

Q. Mr. Stevenson, you attended the first meeting of creditors, I believe? A. Yes, sir.

Q. You and Mr. Wedum? A. Yes, sir.

Q. And Mr. Miller was sworn and examined at that time? A. I believe so.

Q. Do you remember who asked him the questions,

(Testimony of B. W. Stevenson.)

whether you did or Mr. Wedum?

A. To what questions do you refer?

Q. Any questions. Who examined Mr. Miller?

A. I asked him some questions, yes.

Q. At that time you looked over the schedules?

A. Yes, sir.

Q. On that occasion did you or did you not ask Mr. Miller what crops he had growing upon his homestead? A. I did not.

Q. And didn't he reply that he had some 50 or 51 or 52 acres of winter wheat?

A. Not to my knowledge. He didn't make any reply of that kind. I didn't ask him the questions.

Q. Did Mr. Wedum? A. I couldn't say.

Q. You were present at the time?

A. I was present.

Q. Didn't you ask Mr. Miller at that time whether that crop was listed separately from his other property? A. I did not.

Q. And didn't he reply that it was not?

A. Not to me.

Q. Now, you at various times talked the matter of this bankruptcy over with Mr. Conger, the Trustee in bankruptcy? A. In a way, yes, sir.

Q. And at any time, did you and Mr. Conger discuss the fact there was a crop at that time?

A. No, sir.

Q. Nothing ever said about that at all?

A. Not to my knowledge.

Q. Mr. Smith is attorney for the company?

A. Yes, sir.

(Testimony of B. W. Stevenson.)

Q. And represents the company in this matter for sometime? A. He has in this petition.

Q. He did before, did he not?

A. I do not know that he has had any connection with it before.

Q. You discussed this case with him, didn't you, and consulted him as to the preparation of your claim against the bankrupt? A. Oh, yes.

Q. Then he had a part in this matter?

A. Yes, within a recent date, yes, sir.

Q. How far from Dillon is this—is Miller's land?

A. I couldn't tell you the distance. I never was by the place but once.

Q. And you—about how far?

A. I couldn't tell you.

Q. Is it about 10 miles? A. Might be.

Q. It is what is known as the dry land bench? The methods used there in farming are dry land methods? A. Largely, yes, sir.

Q. And are you acquainted with that bench?

A. To a certain extent.

Q. You know, as a general thing, that what those people raise up there is winter wheat—that it is, at least, their principal crop?

A. That is the principal crop, yes, sir.

Q. And knowing that you didn't make any inquiries at any time as to whether he had any crop or not? A. I did not.

Q. You was—you were active there, wasn't you, for your company in trying to find out what goods he had and what the prospects were of collecting your claim?

(Testimony of B. W. Stevenson.)

A. Not after he was discharged in bankruptcy—until certain things came up, I heard about in a roundabout way. Then I became active.

Q. Before that you didn't pay much attention to it?

A. Well, not from the time he filed his bankruptcy until he was put out—or discharged.

Q. You had been trying to collect your claim—had started this suit and obtained judgment before that?

A. Yes, sir.

Q. And yet you hadn't inquired anything about crops?

Redirect Examination by Mr. SMITH.

Q. Mr. Stevenson, just another question to clear this up. I will ask you just what you did question Mr. Miller about at the meeting of creditors.

A. In the list of exemptions Mr. Miller claimed there was various items covering certain quantities of grain held out for seeding purposes. I took the amounts of grain he was claiming as exempt and figured out about how many acres of grain that would seed. I asked him the question how many acres he had prepared for spring seeding. The point I wanted to make was that he was holding out more than he could possibly use for spring seeding. That is the only questions I addressed to him relative to the crop or prospective crop at his place.

Q. And your object in so questioning him was to see if he hadn't allowed too much seed grain—claimed too much?

A. If he wasn't claiming too much grain for seed-

(Testimony of B. W. Stevenson.)

ing purposes. I don't recall just now the number of acres I figured out or how many he told me he had prepared for spring seeding.

Q. Now, then, Mr. Stevenson, did you at any time discuss with the trustee, Mr. Conger, the question of whether or not the amount of seed grain the bankrupt had claimed should be allowed him?

A. I did.

Q. And as a matter of fact, the trustee by his ruling first held that the bankrupt should deliver over a part of the seed grain he had set down as exempt?

A. That is my understanding.

Witness excused.

[Testimony of R. S. Miller, for Petitioner.]

Mr. R. S. MILLER, a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct Examination by Mr. SMITH.

Q. You are R. S. Miller, the bankrupt in this case?

A. Yes, sir.

Q. You made and filed your petition in bankruptcy about the 5th day of last February? A. Yes, sir.

Q. You at that time were living upon a homestead claim a few miles out of Dillon, were you?

A. Yes, sir.

Q. And what growing crops did you have on that place at that time?

A. Approximately 50 acres of turkey red fall wheat.

Q. You had no rye, flax or other grains?

A. No, sir.

Q. Now, then, Mr. Miller, when was this wheat

(Testimony of R. S. Miller.)

planted? Approximately; I don't expect you to remember the week.

A. Just before freezing-up time—anyway, it was—would be safe to say—possibly the last of September or the first of September, middle of September, somewhere about that.

Q. Possibly in September, 1913? A. Yes, sir.

Q. This crop of grain sprouted and grew up before the 5th day of February, did it?

A. No, it didn't grow up; it just sprouted. Some was a little out of the ground, other places wasn't out of the ground. You might as well say it was all up.

Q. Of course, when you filed your petition in bankruptcy, you knew this crop of growing grain was there, didn't you? A. Yes, sir.

Q. And you didn't include it in your schedule?

A. No, sir.

Q. As a separate item. Now, then, you were discharged from bankruptcy? A. Yes, sir.

Q. In April, of this year, I believe?

A. Something like that, yes. I don't remember. You understand—

Q. Now, then, after your discharge from bankruptcy, did you execute a mortgage covering this crop of growing grain? A. No, sir.

Q. You didn't give any mortgage? A. No, sir.

Q. Did you submit your final proof on homestead after your discharge from bankruptcy?

A. Yes, sir.

Q. That proof has gone through the department and I presume you have received final receipt?

(Testimony of R. S. Miller.)

A. Yes, sir.

Q. Now, then, you harvested this crop of wheat and made— How many bushels did you harvest?

A. Well, there was 1,012 bushels total. There was 25 bushels of the 1,012 that was barley. That was spring grain, you understand. That leaves 983, doesn't it?

Q. Then you harvested 987 bushels of wheat?

A. Yes, sir; fall wheat.

Q. What was the value of that wheat? As stated here, \$838.95? A. Something like that, yes, sir.

Q. Now, this crop of wheat was growing upon what number of acres of land?

A. 50, approximately, 50. It was registered 50, but it might be an acre over or under. I never measured with a tape measure.

Q. Did you do any—perform any labor upon this crop of grain prior to cutting it? A. Yes, sir.

Q. After the 5th of February? A. Yes, sir.

Q. In the nature of what?

A. I harrowed it once.

Cross-examination by Mr. RODGERS.

Q. Mr. Miller, at the time that you went in bankruptcy—your schedule and petition was filed and you were adjudged a bankrupt—had you made final proof upon your homestead? A. No, sir.

Q. You were then holding it simply under homestead entry with the United States Government?

A. Yes, sir.

Q. And that is the land upon which this crop was growing? A. Yes, sir.

(Testimony of R. S. Miller.)

Q. Had you had, prior to the time you filed your petition in bankruptcy, any conversation with Mr. Stevenson of the Olmsted-Stevenson Co.?

A. Yes, sir.

Q. Relative to what crop, or about what crop you had? A. Yes, sir.

Q. Where was that conversation, and about when, relative to the time you went into bankruptcy?

A. About 2 days before I took bankruptcy.

Q. And who was present?

A. My wife was present.

Q. Was there anything said at that time about whether or not you had any crops? A. Yes, sir.

Q. What was said relative to the crop, if anything?

A. Why, Mr. Stevenson was going to sue me and get a judgment against me. I went there and—well, I almost begged of him not to sue me—that I didn't want to be sued—that I was willing to square it up any way I possibly could. I offered him a mortgage on the growing crop and note for the balance, together with my notes, and he said, no. He said, "Your note is no good. It isn't worth the paper it's written on, and the crop won't pay the bill."

Q. Did you tell him at that time how much you had in in crop? A. Yes, sir.

Q. Now, at the time you had your petition and schedules prepared in bankruptcy, did you say anything—did you employ anyone to prepare your petition and schedules? A. Yes, sir.

Q. Whom did you employ?

(Testimony of R. S. Miller.)

A. Mr. Gilbert and Mr. Rodgers.

Q. They are partners? A. Yes, sir.

Q. That is my partner and I? A. Yes, sir.

Q. And in the preparation of these schedules, did you say anything to them or either of them about whether or not you had crops out there?

A. Yes, sir.

Q. What did you tell them?

A. I told them I had 50, approximately 50 acres in fall wheat, and he Gilbert, set it down, and after he set it down and when I seen the schedules I noticed that the wheat wasn't on there, and I said to Mr. Gilbert, I says, "What seems to be the cause this wheat isn't down? What is the matter?" "Why," he said, "that's growing in the ground. That's real estate. You couldn't take it out if you wanted to."

Q. Did you believe his advice? A. I did.

Q. And that that was the case?

A. Yes, sir, I did.

Q. Now, did you attend the first meeting of creditors in your bankrupt estate? A. Yes, sir.

Q. And who was present at that hearing?

A. Mr. Wedum, Mr. Stevenson, myself, Clarence Langdorf, Mr. Haskins. I don't know whether I should put his name in there or not.

Q. That is all right. You were sworn and examined at that time? A. Yes, sir.

Q. Do you remember who asked you the questions?

A. Why Mr. Stevenson and Mr. Wedhum, both.

(Testimony of R. S. Miller.)

Q. Who is that, Mr. Stevenson of the Olmsted-Stevenson Co.? A. Yes, sir.

Q. Was there any quesetions asked you at that time, or did you make any statement relative to having a crop upon your homestead? A. Yes.

Q. Go ahead and tell what was said relative to the growing—

A. Mr. Stevenson had the schedules, looked them over, and he says, “I see you haven’t listed your fall wheat,” he says, “that you have planted,” he says. “Have you listed that in a schedule by itself?” I said, “No, sir.” Mr. Wedum asked me as to what crops was I going to put in in the spring, and he also asked me about the growing crop.

Q. Now, Mr. Miller, did you at any time have any conversation with, or did the trustee in this case, Mr. Conger, ever ask you anything about the crops?

A. Yes, sir.

Q. Tell when and where, or where and what was said, as near as you can remember.

A. He came across the street, and I met him in front of the Olmsted-Stevenson store on the opposite side of the street, and I says to him, “When are you coming out to get that stuff, Mr. Conger?” And he says, “Well, I don’t know. I haven’t got them all fixed up, yet,” he says, and “Have you heard anything about the exemptions on that grain?” And I says, “No, sir; I hadn’t heard.” He says, “I wrote up to Butte to find out from Mr. Haskins”—I won’t say whether he said Mr. Haskins or not, but he wrote to Butte to find out. If I remember right, that is

(Testimony of R. S. Miller.)

what he said. Anyhow, he said, "What are you going to do about the fall wheat you have in the ground?" I said that was real estate, as near as I know.

Q. Now, Mr. Miller, you have continuously lived upon your homestead? A. Yes, sir.

Q. That conversation took place sometime last spring, did it?

A. Yes, sir. It was before that Mr. Conger asked for to come out and get the stuff. It was before I had noticed about it at all. Yes, just about the time they was writing about the seed. Whether that ought to be exempt or called seed wheat or what.

Q. Now, who had remained in possession of and occupied your homestead since then?

A. I have.

Q. Who has been farming the homestead?

A. I have.

Q. Have you at any time or at all claimed anybody else was farming that place or taking care of the homestead? A. No, sir.

Q. Who employed or did the work done on the crop. A. I did.

Q. Who made arrangements for the threshing of the grain? A. I did.

Q. In your own name, or somebody else's?

A. In my own name.

Q. Will you state whether or not it was generally known in the neighborhood that you owned that crop? A. Yes, sir.

Mr. SMITH.—Mr. Referee, I do not know just

(Testimony of R. S. Miller.)

what the procedure is, but at this stage I wish to enter an objection as to this as irrelevant and immaterial as to what was generally known in the neighborhood about his growing a crop.

Mr. RODGERS.—It would be a circumstance in—

Mr. HASKINS.—In a question of fraud—but there is a question of fraud, Mr. Smith, and it would be a question of fraud as to whether he attempted to sell it—

Mr. SMITH.—I thought it was attempting to show the question of laches.

Mr. HASKINS.—I thought they were attempting to reach the question of whether they were guilty of fraud or not.

Mr. RODGERS.—When, if at all, did you ascertain that that crop could not be listed separately from the real estate in your schedules?

A. Why, I never knew it should have been listed separately at all—just the other day when they showed their petition. Never thought a thing about it. I always honestly and faithfully thought the crop was real estate at the time of the bankruptcy.

Redirect Examination by Mr. SMITH.

Q. Mr. Miller, you say about two days before you filed your petition in bankruptcy you had this conversation with Mr. Stevenson and your wife was present? A. Yes, sir.

Q. I believe you stated that he—I believed you used the word they, meaning the corporation, were threatening to sue you? A. Yes, sir.

Q. I will ask you if it was a fact that they had

(Testimony of R. S. Miller.)

sued you and obtained judgment as early as the month of January, and that before you had this conversation with them which you say was two days before the 5th of February? A. No, sir.

Q. Do you know when the judgment was obtained against you? A. Yes, sir.

Q. When?

A. Well, not the exact date, no, sir; I don't know, but the day I started bankruptcy proceedings was about 2 days before the trial came off. The first trial, that is, you understand, when you were suing me—when the trial was to come off, that is the time I started bankruptcy. That was when I put it.

Q. Well, you speak of a trial, Mr. Miller, did you ever have any trial of that suit?

A. Why, I didn't come to the trial. You folks got a judgment against me.

Q. Was the time for your answering expired when you filed your petition in bankruptcy?

A. Was the time for answering—I didn't quite get that.

Q. Had the time for answering expired before you filed your petition?

A. Well, I don't know how long that would have been when it would expire—would be just the same day of the suit, wouldn't it? I don't know when it would expire.

Q. You do not know then, when judgment was obtained against you?

A. Not the exact month or day, but I know just about 2 days before that that I started suit, or else

(Testimony of R. S. Miller.)

that it was—if I remember right it was just the day before I got the—or they sued me—the day of the trial that I started bankruptcy proceedings.

Recross-examination by Mr. RODGERS.

Q. What do you mean by starting bankruptcy proceedings? Do you mean when your wife was there, or when you first consulted your attorney about it?

A. When I first consulted my attorney.

Witness excused.

**[Testimony of B. W. Stevenson, for Petitioner—
Recalled.]**

Witness STEVENSON recalled.

Direct Examination by Mr. SMITH.

Q. Mr. Stevenson, do you recall a conversation between yourself and Mr. Miller and his wife respecting their indebtedness to the Olmsted-Stevenson Co.? A. Yes, sir.

Q. Can you tell us when that conversation took place? Was—about when, with respect to the time when he prepared and filed his petition?

A. I think it was just a short time prior to the time I heard he had made petition for bankruptcy. I really do not know the month. It must have been in February some time. I think it was just a short time prior to his making petition in bankruptcy.

Q. Now, what was that conversation about—what was the substance of it?

A. Well, it's pretty hard to recall just exactly what a conversation is about that—because we have quite a few of those conversations. But, as near as my remembrance is, that he offered—that is he

(Testimony of B. W. Stevenson.)

wanted to know how we could settle the affair and I believe I suggested that if he would give me a mortgage on his chattel property, which was some horses, that we could fix it up that way, and he stated there was 2 of the horses, I think it was 2, that belonged to his wife, that were already under mortgage to his brother in law or some in law or some relative of his, and that the other horses he wouldn't mortgage them under any condition. Then he suggested that if he could get his father in law to go on his note, if that would be satisfactory. I told him it would be entirely satisfactory to have his father in law, Mr. O. W. Smith, would sign his note with him. Evidently his father in law wouldn't do it, because they never did it. The next thing I heard was they were in bankruptcy.

Q. Now, Mr. Stevenson, do you know the condition or the period that had been reached by the suit of Olmsted-Stevenson Co. against Miller at the time you had this conversation with him? Had he then been sued?

A. I believe we had obtained judgment by default prior to this conversation. Now, that matter isn't clear in my mind, because I hadn't given it any thought, but it runs in my mind that a judgment was given in January. Of course, the court record will show that. I wouldn't make a statement of that. Mr. Rodgers was present at the time, but I am inclined to think it was in January, I wouldn't be positive about it.

Witness excused.

[Testimony of Clarence Langdorf, for Bankrupt.]

Mr. CLARENCE LANGDORF, a witness on behalf of the bankrupt, being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. State your name. A. Clarence Langdorf.

Q. Where do you reside?

A. At the present time about 3 miles east of Dillon.

Q. I will ask you whether or not you were present at the first meeting of creditors in the R. S. Miller bankruptcy case? A. Yes, sir.

Q. Who was present?

A. Mr. Stevenson, Mr. Wedum, Mr. Haskins, Mr. Rodgers, Mr. Miller and myself.

Q. Do you remember whether or not Mr. Miller was sworn and examined at that time?

A. Yes, sir.

Q. Do you remember whether or not in his examination anything was said about him having a crop already planted upon his homestead?

A. Yes, sir.

Q. State as near as you can remember what was said.

A. I am not sure who asked him the questions but some one asked him the question if he had any fall crop in and how much and if I am not mistaken he said 51 or 52 acres. They asked him if he had any spring grain in and what he considered the total of spring grain in the ground would be. He turned and asked me—I had cut some grain for him the

(Testimony of Clarence Langdorf.)

year before—and he asked me how many acres there was in that patch and I told him 22 and then he said he was going to put that 22 and some more—I have forgotten how much he said he put in.

Cross-examination by Mr. SMITH.

Q. Well, do you know who Mr. Wedum was representing at that time?

A. I was under the impression Mr. Wedum was representing himself.

Q. Nothing to show he was representing the Olmsted-Stevenson Co.? A. Well, no.

Q. Now, then, these things you say were asked of Mr. Miller. Do you know whom they were asked by?

A. That I cannot say. I don't remember.

Q. There was considerable amount of that talk at that time had with reference to the crops he was going to plant at some time after that date?

A. Oh, yes.

Q. And considerable discussion as to how much he would plant and how much seed grain he would require? A. Yes, sir.

Witness excused.

[Testimony of C. W. Conger, for Bankrupt.]

C. W. CONGER, a witness on behalf of the bankrupt, being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. Your name is C. W. Conger? A. Yes, sir.

Q. You reside at Dillon, Montana?

A. Yes, sir.

Q. You were the trustee in this bankruptcy pro-

(Testimony of C. W. Conger.)

ceeding? A. Yes, sir.

Q. Do you remember about when you were appointed trustee?

A. No, I don't, but the papers there will show. I think you have my files. The petition was filed about February 5th, 1914, and I think I was appointed within the next 10 days, but I don't see the order of appointment. Here is a carbon copy of the order and it was dated the 4th day of March, 1914.

Q. Did you, after you were appointed did it come to your knowledge that Mr. Miller had a winter crop growing upon his homestead? A. Yes, sir.

Q. How soon after your appointment would you say it was that you first ascertained that fact?

A. It was prior to my making report on exemptions.

Q. Do you know what date you made your report on exemptions?

A. On the first day of April, 1914.

Q. Do you remember how that first came to your knowledge?

A. No, sir, I couldn't say positively whether I heard it from you or Mr. Smith or Mr. Stevenson.

Q. Did you have any conversation with or consult with Mr. Stevenson relative to the growing crop upon the premises?

A. I wouldn't say positive about that. I consulted with Mr. Smith in regard to it.

Q. And whom did Mr. Smith represent?

A. Well, I presumed he was representing the

(Testimony of C. W. Conger.)

Olmsted-Stevenson Co.

Q. Do you know whether or not at any time you had any conversation or spoke to Mr. Stevenson about the crop?

A. I had a conversation with Mr. Stevenson in regard to the amount of grain that was to be exempt as grain to be planted. My impression is that we talked of the grain that had already been planted, but I wouldn't say positively as to that.

Q. But you know you talked it over with Mr. Smith? A. I talked it over with Mr. Smith.

Q. Now, did you consider the question as to whether or not that crop should be turned over to the trustees—to the administrators?

A. I did consider it and I asked Mr. Smith at the time about it and he said it was part of the real estate, and I think you advised me to the same effect.

Q. Yes. That transpired before you made your report setting out exemptions? A. Yes, sir.

Q. Did you —

Mr. SMITH.—If the Court please I object to this line of questioning as being irrelevant and immaterial for the reason that at the present time that part—what he may have been advised about this is entirely beside the question. It is what the bankrupt did we are investigating. It doesn't make any difference if the trustee knew or didn't know that this was exempt or whether the persons that may have been questioned about the matter knew or didn't know what they were talking about.

Mr. RODGERS.—I call your attention to the case

(Testimony of C. W. Conger.)

In re Hanson reported in 107 Fed. on page 252 (reading from the decision). That is a positive statement. It is also held in another case that—

Mr. SMITH.—You haven't shown there was any attorneys representing the creditors there.

Mr. HASKINS.—The objection is overruled. I think knowledge of the trustee would be the knowledge of the creditors, especially under the circumstances in this case.

Mr. SMITH.—Do we understand Mr. Referee that the knowledge as you say of the Trustee of the existence of this crop becomes the knowledge of the creditors when the trustee doesn't take it up with the creditor?

Mr. HASKINS.—The Trustee represents the creditors, Mr. Smith, is supposed to.

Mr. SMITH.—That is very true.

Mr. HASKINS.—Supposed to represent the creditors only in this matter.

Mr. SMITH.—I don't believe the record so far shows that Conger conferred with the creditors about this. He hasn't said he conferred with any one who stated they represented the creditors in this matter.

Mr. HASKINS —But, Mr. Stevenson said you were his attorney at all times and I believe Conger said he consulted you.

Mr. SMITH.—I believe the entire record will show that Mr. Stevenson said that ordinarily I represent his company in matters of this kind and that I had prepared their claim.

(Testimony of C. W. Conger.)

Mr. HASKINS.—As I understand, Mr. Stevenson answered in response to a question asked him that you had been his attorney.

Mr. SMITH.—No, he said that I had been his attorney as to this procedure. I have been in this matter of the Olmsted-Stevenson petition filed here a few days ago.

Mr. HASKINS.—Anyway, I think, Mr. Conger would represent the creditors, his knowledge would represent the creditors as he represents all the creditors.

Mr. SMITH.—Then that would have the effect that we would suffer by his laches, of which we knew nothing.

Mr. HASKINS.—You had the opportunity of questioning him at all times.

Mr. SMITH.—A creditor couldn't fathom his mind as to what he might have known as to existing conditions. We cannot see how to meet a proposition of that kind because it is impossible that these creditors should have been held accountable for what we may term laches on the part of the Trustee, if such it be. He might have discovered a gold mine or some other kind of property. Could we fathom that?

Mr. RODGERS.—He is the agent of the creditors.

Mr. SMITH.—Any way you look at it—if it were the duty of the trustee to report this to somebody I do not see how his failure to do so is any laches on the part of a creditor.

Mr. HASKINS.—It is his duty to make a report

(Testimony of C. W. Conger.)

every two months, Mr. Smith, the creditors have the opportunity of examining those reports, examining them for themselves.

Mr. SMITH.—They didn't know of this crop.

Mr. HASKINS.—I overrule the objection.

To which ruling of the Referee the petitioner then and there duly asked for and was granted an exception.

Mr. RODGERS.—Did you tell the attorney for the bankrupt what conclusion you had come to relative to the crop that was in the ground?

A. I think I talked to them about it.

Q. Do you remember what you told him?

A. Well, I think I asked you in the first place whether it was part of the real estate or not, and I had talked to Mr. Smith at the same time and I think I told him you said it was part of the real estate.

Q. And did you at that time state whether or not you told the attorney for the bankrupt that you were going to decide that that was correct, or anything to that effect?

A. I couldn't say as to that, but I supposed it was correct.

Q. The land upon which this crop was growing was set up as exempt, was it not? A. It was.

Cross-examination by Mr. SMITH.

Q. Now, Mr. Conger, you didn't have any knowledge that I was ever talking to you as the attorney for the Olmsted-Stevenson Co. in that matter, did you?

A. Why, I don't know that I had ever been told

(Testimony of C. W. Conger.)

so. I know that at the time there was talk of presenting claims against the bankrupt Mr. Stevenson talked about going to you and getting you to prepare the claims and even asked me about the forms.

Q. Yes. You knew I had prepared these claims and helped him to make it up and file it?

A. Yes, sir.

Q. Now, then, Mr. Conger, was there ever any question in your mind as to whether or not that schedule should be amended, or whether it was up to you to report or not report the fact that a growing crop of grain was in existence?

A. I think I was in doubt about it. That is the reason I asked you.

Q. Well, did you consider that you were asking that to find out whether or not you would report that he had a growing crop of grain?

A. I asked the question of you because of the fact that I thought you were representing the Olmsted-Stevenson people.

Q. You understood that I was attorney for them in a number of matters, in different matters, and that I had talked with you about their claim and was in, and active in this matter? A. Yes.

Q. Did you inquire of anybody about this growing crop of grain?

A. I didn't need to. It was reported to me that the crop was growing there.

Q. Could you say who reported it to you?

A. Couldn't say positive. I think I heard so from Mr. Rodgers, and I am of the impression that

(Testimony of C. W. Conger.)

Mr. Stevenson and I talked of it, but I wouldn't say positively as to them. I know we talked of the other grain.

Q. About the amount he should retain for seed?

A. Yes, sir.

Q. And whether or not he should retain seed to plant in the spring or to plant in July or August?

A. Yes, sir, I took the matter up with the Referee too.

Q. That was the law point you really threshed out?

A. That was the one I really tested, yes, sir.

Q. Well, you discussed with Mr. Rodgers, the man you knew was attorney for the bankrupt, the question of the existence of this crop of grain?

A. Yes, sir.

Q. And you received from him advice to the effect that it was not entitled to be listed?

A. That it was part of the real estate.

Q. And in other words would be exempt along with the real estate?

A. Yes, sir, received the same advice from you I think.

Q. And received the same advice from me?

A. Yes, sir.

Q. But you didn't know whether I was talking to you as attorney for the Olmsted-Stevenson Co. or merely because I happened to be an attorney?

A. I couldn't say positively as to that, no, sir.

Redirect Examination by Mr. RODGERS.

Q. Mr. Conger, you didn't have any idea but what

(Testimony of C. W. Conger.)

it was your duty, if there was assets belonging to the bankrupt, to collect it in? A. No, sir.

Q. There was never any question in your mind about that?

A. Never. I tried to collect everything that belonged to the estate.

Recross-examination by Mr. SMITH.

Q. Mr. Conger, did you at any time report to the Olmsted-Stevenson Co. or any one you knew to be representing them that there was a crop of growing grain on the land of the bankrupt?

A. No, sir, I don't think I ever did.

Q. You didn't do that, and you didn't request them to enlighten you as to whether or not you should include it and require it to be included?

A. No, I don't think I ever took the matter up with either Mr. Stevenson or any of the firm in regard to the growing crop.

Witness excused.

[Testimony of H. G. Rodgers, for Bankrupt.]

H. G. Rodgers, a witness on behalf of the bankrupt, after being duly sworn, testified as follows:

Direct Examination by Mr. RODGERS.

Q. Your name is Henry G. Rodgers?

A. Yes, sir.

Q. Of Dillon, Montana? A. I am.

Q. You remember the meeting of creditors for Mr. Miller heard here in this office? A. I do.

Q. Well, just give us what happened there according to your recollection.

(Testimony of H. G. Rodgers)

A. As I remember it, Mr. Stevenson was looking over the schedules and questioning Mr. Miller relative to what property he had. Among other questions he asked Mr. Miller what—if he had any fall wheat. Mr. Miller replied that he had, and I think he told him the number of acres. And as I remember it, either Mr.—I think it was Mr. Stevenson asked him if he had listed that separately in the schedule. Mr. Miller said no, he had not.

Cross-examination by Mr. SMITH.

Q. Now, Mr. Rodgers, you say he asked about fall wheat? A. That is as I remember it.

Q. You didn't explain whether he meant a growing crop or 1913 grain?

A. It was relative to fall wheat in the ground.

Q. Are you positive as to that?

A. That is my best recollection. I have always remembered it that way.

Q. And in the questions regarding acres could it not have been discussing the number of acres he was to plant during the summer of 1914?

A. As I remember it I remember both subjects being discussed. How much he had in and what was to be planted.

Q. From the standpoint of acres?

A. From the standpoint of acres.

Q. Now, Mr. Rodgers, there has been some testimony to the effect that the trustee was advised by both you and me.

Mr. RODGERS.—I object to that as not proper cross-examination. That matter wasn't gone into

under direct examination. I also object to it because you cannot ask an attorney what his client told him or what he told his client.

Mr. SMITH.—I am not asking him what his client told him or what he told his client.

Mr. RODGERS.—Not proper cross-examination. I asked merely about his hearing here.

Mr. SMITH.—I am merely trying to give Mr. Rodgers a chance to give—

Mr. RODGERS.—That is not proper testimony.

Mr. HASKINS.—I suppose you can recall Mr. Rodgers, Mr. Smith.

Witness excused.

[Testimony of R. S. Miller Recalled.]

Mr. R. S. MILLER, recalled, testified as follows:

Direct Examination by Mr. RODGERS.

Q. I will ask you, Mr. Miller, whether or not you have always claimed this crop as exempt?

A. Yes, sir.

Q. And do you now claim it as exempt?

A. Well, I couldn't now—at the present time as near as I can see it, it is for Mr. Haskins to judge as to whether it was exempt or not.

Q. Do you claim it as exempt?

Mr. SMITH.—I object to that as being a useless question. What he claims doesn't have anything to do with it.

Mr. RODGERS.—May be it is.

Q. Now, what work, if any, have you done on that crop since the date upon which you were adjudged a bankrupt, February 5, 1913?

A. I done all the work. I harrowed it, harvested

(Testimony of R. S. Miller.)

it, threshed it and hauled it from the field to the granary.

Q. Can you give us any idea as to what you have expended and what the reasonable value of your services has been in taking care of that crop?

A. Approximately \$326.

Q. Have you kept an account or made a record or figured out how—what composed that amount?

A. Yes, sir.

Q. Could you tell us what it consists of?

A. Harrowing, use of binder, horses, 3 different men to shock with, binder twine, cook, teams, men to help meals hay, oats threshing, oil for engine, sacks, hauling in wheat from field to granary so it wouldn't spoil.

Q. Amounting in the total to how much?

A. Practically \$45 worth of sacks I never put down there at all. \$325.33; that is not figuring the \$45.

Q. Now, that \$45 isn't calculated in that and it represents what you paid for the sacks?

A. Yes, sir.

Q. Now, is there included in that amount an estimate of the rental value of that ground from the time you went into bankruptcy until the crop was taken care of? A. No, sir.

Q. What would be your estimate as to the rental value of the ground for that period of time?

A. What would be my estimate?

Q. Yes, sir.

A. Everybody who rents land or has rented land

(Testimony of R. S. Miller.)

the renter; that is the man who rents the land puts in the crop and takes it out, and the man who owns the land has been getting one-third of the crop. That is what it has been through there.

Q. That is what you use to figure from?

A. Yes, sir.

Q. How much would you say then, figuring from that, would be the reasonable rental value of this land for the period from February 5th until the crop was taken care of?

A. Well, it would be one-third of the amount of wheat I had there, 987 bushels. It was one-third of that it would be.

Q. About how much would that be worth in dollars?

A. At the present time the way wheat is going now it would be worth in the neighborhood of \$300 I guess, \$250; something of that sort. I never figured it up.

Q. Are you living now on your homestead?

A. Yes, sir.

Q. Was you living upon your homestead at the time you filed this petition? A. Yes, sir.

Q. And have you lived upon it ever since?

A. Yes, sir.

Q. Have you a family? A. Yes, sir.

Q. Wife?

Mr. SMITH.—We admit he is man of family engaged chiefly in tilling the soil.

(Testimony of R. S. Miller.)

Cross-examination by Mr. SMITH.

Q. Now, Mr. Miller, you say you harrowed this wheat? A. Yes, sir.

Q. What did it cost you to harrow it?

Redirect Examination by Mr. RODGERS.

Q. What have you done with the wheat, if anything?

A. Why, some of it I sold, paid out bills, in bills, some I got some money for. Used the money to pay for groceries.

Q. About how much would you say you had sold?

A. I think—it is mighty hard to make an estimate on it. I think probably there is 350 bushels gone now.

Q. And have you kept the rest of it there on the ranch? Have you fed any of it?

A. Yes, sir. I don't know how much I have fed.

Q. About how much would you estimate there was on the ranch?

A. I think close to 600 bushels.

Q. Have you been paid for all the wheat you sold?

A. Yes, sir.

Q. What have you done with the money?

A. Paid bills and ate it up.

Q. Ate it up? A. Yes, sir.

Q. Bought stuff to eat? A. Paid some bills.

Q. Have you expended all the money you received for that wheat in payment of bills and for goods that have been used? A. Yes, sir, and more.

Q. The wheat you have sold—you haven't got it

(Testimony of R. S. Miller.)

now? A. No, sir.

Q. And you haven't got anything in place of the wheat, have you?

A. Well, that would be pretty hard to say now. You see I got binding twine and enough—some sacks and one thing and another

Q. That was used in putting up the crop?

A. Yes, sir.

Recross-examination by Mr. SMITH.

Q. How long did it take you to harrow this crop of wheat? A. Why—

Q. What kind of a tool did you harrow that grain with? A. With a harrow.

Q. What kind of a harrow?

A. Spike tooth harrow.

Q. How many horses did you have on it?

A. Four.

Q. How many men did it take to run that?

A. One.

Q. How many acres would you harrow in a day?

A. I don't know how many acres I would harrow in a day.

Q. How wide was the harrow?

A. Blamed if I know.

Q. Well, estimate it, Mr. Miller. You know something about—how near?

A. Oh, I would safely say about 12 feet, I think.

Q. About 12 feet wide, and you worked it with four horses? A. About that.

Q. Can you tell us about how many acres you would drag over in a day?

(Testimony of R. S. Miller.)

A. No, that would be pretty hard to say because some days I would not work a long day, you understand, and that is pretty hard to say how long a day I would put in. It would depend upon the day we put in.

Q. With that kind of an outfit couldn't you easily harrow two acres in an hour? A. Well, no, sir.

Q. You think you couldn't? A. No.

Q. Were you lap-harrowing it? A. No.

Q. Just once over? A. Once over.

Q. And do you think in a day of 8 hours you could have handled 16 acres?

A. Well, it seems to me I ought to be able to handle 16 acres all right in a day, you understand?

Q. Well, then it would take you but very little over 3 days to handle all of it, wouldn't it?

A. No, it wouldn't take probably over 3 days.

Q. Now, what is the use of 4 horses worth for a day?

A. A man and 4 horses is worth \$10 per day.

Q. \$10 a day?

A. Yes, sir. By the time you feed them.

Q. Then at that figure the cost of harrowing it would be practically \$30?

A. I put it down at \$25.

Q. You put it down at \$25, then, the original cost?

A. Yes.

Q. Did you ever get \$10 per day for a man and 4 horses? A. Oh, yes.

Q. Where? A. I got it in Washington.

Q. What was the nature of the work?

(Testimony of R. S. Miller.)

A. Most every kind of work. Everything.

Q. Is that kind of a basis the basis on which you figured out this \$325 expense? A. No.

Q. Is anything else?

A. You understand, Mr. Smith, I didn't figure that at \$10 per day. You stated approximately—

Q. At 50¢ per acre?

A. And that is what everybody charges to harrow.

Q. Now, what did it cost you to cut this grain? What do they charge per acre for cutting grain?

A. It all depends upon who it is. The use of the binder—I paid 40¢ per acre, just for the use of the binder. I figured the use of my horses and myself was worth 50¢ per acre, because I have to feed them and it cost me approximately \$100 last year to have it cut. It cost me practically last year to have my grain cut, \$1.00 per acre.

Q. Then it cost you to cut it \$1.00 per acre, which would be \$50. Is that right?

A. Why, no. I don't want to job you there. I put down here use of binder 40¢ per acre, which I paid out just for the use of the binder alone, came to \$20. Use of horses and myself came to \$25 at 50¢ per acre, that is a cost of 90¢ per acre.

Q. That is \$45 then. Is that right?

A. Yes, yes, sir, you're right.

Q. Now, then, *you to* shock the grain?

A. Yes.

Q. Do you know what that cost you?

A. Cost me about \$25.

Q. What did it cost to get it threshed? What did

(Testimony of R. S. Miller.)

you pay per bushel for threshing?

A. I paid 4¢ per bushel to have it threshed.

Q. And you had how many bushels?

A. 987, yes, sir.

Q. It cost you about \$40 for threshing?

A. Right close to it, yes. The whole bill was \$40.48.

Q. \$40.48?

A. Yes, sir. Then of course there was 25 bushels of barley that was figured. It went the same as the wheat did.

Q. Now, then, did you have any expenses incident to threshing. Outside of paying for the threshing? In other words, was it threshed by community help or independently?

A. Why, independently and community help.

Q. What help did you require during threshing?

A. You understand we have more expenses, binder twine 125 lbs. at 12¢ per lb. If I remember right that is what I paid for it. Mr. Stevenson knows what—

Q. What did your twine come to?

A. I got it \$12.50.

Q. And your sacks was how much?

A. \$45. I paid 10¢ a piece for the sacks.

Q. Pay anything for string, sewing twine?

A. Yes. Oh, it couldn't have been over a couple of dollars any way.

Q. All right we will put it down a couple of dollars. Now, what help did you require, and what was it worth, in assisting in the threshing?

(Testimony of R. S. Miller.)

A. Well, really, I put in everything here. Now, the outside labor time I put that down here come to \$50.90.

Q. That was labor on threshing the grain or threshing and hauling it to the granary?

A. Outside labor, that is what was hired outside, not figuring myself whatever, just hired help to help with the threshing, men and teams, and a man to pitch it together with the sack sewer, one sack sewer.

Q. Hired help, \$50, you say?

A. And 90¢, not figuring myself.

Q. What is yours?

A. The way I rustled around, see, I figured \$5 per day.

Q. How many days did it take you to thresh?

A. I was threshing 2 days and a half.

Q. \$12.50? A. Yes, sir.

Q. Does that bring all the expense down to hauling it to the granary? A. No, sir.

Q. What other expense? A. About 14 men.

Q. I have put down here hired men 14.

A. You understand that was help to bring the grain into the machine and thresh it—it was not figuring meals or anything of that sort. There were 14 men and I charged 50¢ per meal.

Q. 14 men there for 8 meals, \$56? A. Yes, sir.

Q. All right, what else?

A. I fed up a ton of hay worth \$15, laid on the ranch.

Q. You would have been required to feed your

(Testimony of R. S. Miller.)

horses if you hadn't been threshing. Wouldn't they have eaten anything if threshing hadn't been going on? A. Yes, sir.

Q. You charge that to threshing?

A. I hired these teams to come out and do the threshing. They wouldn't have threshed if I didn't feed them.

Q. Outside teams?

A. My own teams was in with them.

Q. A ton of hay is worth how much?

A. \$15.

Q. Do you know of any \$15 hay in Beaverhead County, Mr. Miller?

A. No, I don't, Mr. Smith. I put that down at \$15, because as a rule we have to go out and get hay, haul it ourselves, and I figure up to \$15 for that load of hay.

Q. I am not objecting, I am asking you what a ton of hay costs delivered at your ranch. You are under oath. You may say what you think it is. I am not going to quarrel with you about it. You want it calculated at \$15, do you? A. Yes, sir.

Q. Is there anything—

A. They fed up a thousand lbs. of oats while they were there.

Q. A thousand lbs. of oats? A. Yes, sir.

Q. How many horses did you have there at that threshing? A. 19 head.

Q. 19 head of horses? A. Yes, sir.

Q. Two days and a half? A. Yes, sir.

Q. That would be equal to how many horses for

(Testimony of R. S. Miller.)

one day? A. How's that?

Q. We will say 50 horses for one day. Is that right?

A. Well, I don't want to give you the worst of it. That would be giving me the best of it. It wouldn't hardly be that much.

Q. Figuring it at 50 horses for one day then, each horse had how many lbs. of oats?

1. 10 lb. bucketful. How much will that weigh?

A. I don't know.

A. Now, I will tell you. 30 lbs. a day to each horse. 50 times 30 would be 1500 lbs., is it not?

Q. Did you ever feed a horse 30 lbs. of wheat in one day?

A. You stated you would give 10 lbs, to the bucketful.

Q. I am saying 10 lbs of oats to a—I am not stating what your bucket weighed. You say you fed 1000 lbs of oats. What were they worth?

A. Well, they cost me \$12.50 besides the hauling of them.

Q. Now, then, is there anything further?

A. That makes \$12 dollars, \$17.50.

Q. How's that? A. \$17.50. There is oil.

Q. All right, how much oil? A. \$11.70.

Q. What were you oiling? A. Gas engine.

Q. Did you own the engine?

A. No, W. L. Leck.

Q. Is there anything further?

A. Then I had to get that too—let that go in with the other. Then I put hauling wheat inside shed \$15.

(Testimony of R. S. Miller.)

Q. Didn't you haul this wheat during the same 2 days and a half?

A. No, stacked it up outside and hauled it in after.

Q. Is that the end of the expense items?

A. No, sir.

Q. What else have you got?

A. I believe it is. I believe that is—yes, I believe that is the end of it.

Q. You figure \$352.38? According to your figures you say it cost you that to harrow, harvest, thresh and house your grain?

A. I have it here, \$325.33. Yes, that is about right. I got it a little less the way I figured it, but—

Q. You still have 600 bushels of grain on hand at the ranch? A. Approximately 600.

Redirect Examination by Mr. RODGERS.

Q. Mr. Miller how did you arrive at the amount of oath the horses ate?

A. Well, really—I have an oat box out there just holds 1000 lbs. filled to the top. When I turned the fellows loose it was full and when I come to get my oats I looked in the box and found it empty. That is how it was.

Witness excused.

[Testimony of H. G. Rodgers—Recalled.]

Direct Examination by Mr. SMITH.

Q. Mr. Rodgers, it appears that in the testimony here that we both gave some advice in this matter voluntarily or as counsel, was it not, to the effect that this growing crop of grain was real estate and that

(Testimony of R. S. Miller.)

that advice was perhaps acted upon by the trustee and the bankrupt. Now, I will ask you if it isn't a fact that many of the law books treat growing crops as realty until severed from the ground?

A. Why, that is a hard question to answer.

Mr. RODGERS.—I don't think I would try to answer what the law is under—

Mr. SMITH.—I recognize that it was properly outside of this case, Mr. Referee, going into the matter, but it might appear that Mr. Rodgers and I didn't know much about what we was talking about. My idea is still that we were correct and it has nothing to do with this case.

Witness excused.

**[Certificate of Clerk U. S. District Court to
Transcript of Testimony.]**

I, Geo. W. Sproule, Clerk U. S. District Court for the District of Montana, do hereby certify the foregoing to be a true copy of the transcript of testimony taken before the Referee, on file in my office as such clerk.

[Seal]

GEO. W. SPROULE,
Clerk.
By Harry H. Walker,
Deputy.

[Exhibit "B"—Order Overruling Referee's Order.]

*In the District Court of the United States, for the
District of Montana.*

No. 762.

In the Matter of R. S. MILLER, Bankrupt.

This cause came on at this time for decision of the Court. And thereupon after due consideration, it is ordered that the Referee's order be and the same hereby is overruled.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the above is a full, true and correct copy of the minute entry made in the above-entitled cause on the 27th day of March, 1915.

[Seal]

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk.

[Endorsed]: No. 2628. United States Circuit Court of Appeals for the Ninth Circuit. In re R. S. Miller, a Bankrupt, Olmsted-Stevenson Co., Plaintiff, vs. C. S. Miller, Defendant. Amendment to Petition for Revision. Filed Oct. 9, 1915. F. D. Monckton, Clerk. By _____, Deputy Clerk.

[Endorsed]: No. 2628. United States Circuit Court of Appeals for the Ninth Circuit. Olmsted-Stevenson Company, a Corporation, Petitioner, vs. R. S. Miller, Bankrupt, Respondent, In the Matter of R. S. Miller, Bankrupt, Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the District of Montana.

Filed July 27, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of R. S. MILLER,
A Bankrupt.

OLMSTED-STEVENSON COMPANY
(a corporation),

Petitioner,

vs.

R. S. MILLER,

Respondent.

BRIEF FOR PETITIONER.

JOHN B. CLAYBERG,
Attorney for Petitioner.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

OCT 16 1915

No. 2628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of R. S. MILLER,	}
A Bankrupt.	

OLMSTED-STEVENSON COMPANY	}
(a corporation),	

Petitioner,

vs.

R. S. MILLER,	}

Respondent.

BRIEF FOR PETITIONER.

This hearing is upon a petition to revise and review an order of the District Court of the United States for the District of Montana, made and entered in the above matter on or about the 27th day of March, 1915.

Statement of Facts.

The undisputed facts, as disclosed by the record, are that the bankrupt, R. S. Miller, had entered a

piece of government land as a homestead under the Acts of Congress, in September, 1910 (Tr. p. 14), and was in possession thereof as such homesteader during the years 1913 and 1914; that in the fall of 1913 he planted fifty acres of this homestead in winter wheat, which at the time of the filing of his petition in bankruptcy was a growing crop (Tr. p. 14); that on February 5, 1914, he filed his voluntary petition to be adjudged a bankrupt, and that he was adjudged a bankrupt and received a discharge in April, 1914. The petitioner was named in the bankrupt's schedule of creditors for the amount claimed as due it. It proved its claim, which was recognized and allowed by the trustees.

It seems that the bankrupt did not place in his schedule of assets and property such growing crop of grain, and, after his discharge but prior to the closing of the estate, petitioner herein sought to have the bankruptcy proceeding opened and the bankrupt directed and ordered to amend his schedule of property and assets so that it might include the growing crop of wheat (Tr. pp. 3 *et seq.*).

The bankrupt contested the relief asked on the ground that the crop was exempt to him under the statutes of Montana, and also under the laws of the United States, and insisted that the trustee in bankruptcy and the petitioner were guilty of such laches as to be estopped from being entitled to the relief asked (Tr. pp. 10 *et seq.*).

The Referee who heard the matter upon the original petition, found in favor of your petitioner (Tr.

p. 20), but upon the petition of the bankrupt to the District Court of the United States for the District of Montana, that court reversed the decision of the Referee (Tr. pp. 29 and 84).

Argument.

But two questions seem necessary to be considered by this court upon this hearing, namely: (I) Was the growing crop of wheat an asset of the bankrupt which passed to the trustee for the benefit of creditors; and (II) Is petitioner estopped from procuring the relief sought because of laches in the filing of his petition?

Logically, these questions should be considered in their inverse order, because if the petitioner is estopped by laches, the first question becomes immaterial.

I.

WAS THE PETITIONER ESTOPPED BY LACHES?

It is too well settled a proposition to require the citation of authority, that a bankrupt court sits as a court of equity and is governed by equitable rules. The question of laches must, therefore, be determined by the application of equitable rules as established in the federal courts of the United States. It is held in the case of *Valvona, etc. v. Marchiony*, 207 Fed. 380, that laches in equity is based upon the doctrine of an equitable estoppel against the party

bringing the suit or proceeding. It is held in *Gal-
liher v. Cadwill*, 145 U. S. 368, that in applying the
doctrine of laches or estoppel, courts of equity pro-
ceed upon the assumption that the party to whom
laches is imputed has had full knowledge of his
rights and an ample opportunity of establishing
them; that by reason of his delay the adverse party
has good reason to believe that the alleged rights
are deemed worthless, or have been abandoned, and
because of the change in conditions or relations dur-
ing the period of delay it would be unjust to the
defendant to permit the opposing party to assert
his rights. Therefore, unless the bankrupt has
disclosed some injury or prejudice occurring to him
or his estate during the delay of petitioner in
filing its original petition, or that he has changed
his position relying upon the non-action of this
petitioner, so that the granting of the order prayed
for would be inequitable, the question of laches
amounts to nothing.

Nowhere in any of the pleadings or proceedings is
it alleged that the bankrupt had changed his position
or was injured by relying on the fact that the peti-
tioner had waived or abandoned its claim.

We concede that upon this hearing this court may
not consider disputed questions of fact, only ques-
tions of law can be considered. Whether the evi-
dence introduced is sufficient to sustain the order
sought to be reviewed is a question of law and may
therefore be considered by this court.

Kirsner v. Taliaferro, 202 Fed. 51;

In re Frank, 182 Fed. 794;

In re Lee, 182 Fed. 579;

In re Knosher, 197 Fed. 136 (this court).

True, it is alleged in the bankrupt's answer to the original petition filed herein, that the petitioner,

“with full knowledge of all the facts in this case as aforesaid, consented, advised, and knowingly permitted the said trustee to proceed with the administration of said estate and set aside to this bankrupt his exemptions including the real estate on which said crop was growing, and to permit this bankrupt in good faith to expend his labor, time, material and money in taking care of, harvesting and marketing said crop, and that by reason thereof said petitioning creditor now is estopped from claiming or requiring this bankrupt to surrender said crop or to surrender the proceeds of said crop in order that the same may be administered and distributed to this bankrupt's creditors herein” (Tr. p. 17).

But there was no allegation that he took care of, harvested and marketed the crop in reliance upon the silence of this petitioner, or that he was led to spend his money or change his position relative to the crop in reliance upon any action of your petitioner. There was not one syllable of evidence offered at the hearing before the Referee to support the above allegation. All the evidence introduced in behalf of the bankrupt simply tended to show that he acted in good faith and upon the advice of his attorneys in not placing this growing crop in his schedule of assets and property (Tr. pp. 53-54, 56, 71); that petitioner's agent knew of the existence of the crop; knew that the bankrupt claimed

that it was exempt and that the land upon which the crop was growing had been set aside to him as exempt property. There was absolutely no evidence introduced even tending to show that your petitioner ever consented to anything or that the bankrupt spent his time and money in caring for, harvesting and marketing the crop in reliance on the inaction of your petitioner to his injury, but the testimony introduced conclusively shows that he performed all these acts because he believed and had been advised that he was *the owner of the crop* (Tr. pp. 53, 54, 56, 71). There was no testimony to indicate that your petitioner had led the bankrupt to believe, or that the bankrupt did believe, that your petitioner had waived any rights which it might have had or claimed, or would never attempt to enforce them. There is nothing to bring the matter within the doctrine of *Gallier v. Cadwill, supra*. The bankrupt doubtless believed that he was the owner of the crop and that no one questioned it.

It appears exceedingly strange to us that if the bankrupt had relied upon the acquiescence and silence of your petitioner concerning the ownership and right to the crop, he should have kept so accurate an account of the time, money and labor he placed upon the growing crop, even to the value of harrowing the same (Tr. pp. 72 to 82). Presumably he made his memoranda of expenses at the time he incurred the same (Tr. p. 72), realizing that it was doubtful as to his ownership of the crop, and intended to "play safe", so that he might recover his

expenses of caring for the crop in case the matter should finally be decided against him.

Under the circumstances disclosed by the pleadings and testimony we concede that it would be only equitable and right that the bankrupt be allowed to retain out of the proceeds of this crop every dollar he has spent in caring for, harvesting and marketing the same, and reasonable compensation for any time or labor he expended, together with a reasonable rental for the land upon which this crop was growing. We have no doubt that he acted in good faith and upon the advice of his attorneys, although he evidently was aware of the fact that his rights were doubtful. We cannot consent, however, that he be allowed to retain anything beyond what would be sufficient to make him whole. This would be inequitable to the creditors and place a premium upon dishonesty of a debtor.

It seems that the bankrupt insisted in the court below that the trustee was agent for the creditors and that he, the trustee, was guilty of such laches as to prevent him from claiming this crop as a part of the estate of the bankrupt for distribution among his creditors, and that petitioner, being one of the creditors, was and is bound and concluded thereby. It appears from the opinion of the court below that he coincided with this view and held the trustee guilty of such laches as to bar petitioner.

In this view, we insist that both were mistaken. The court says:

“No fraud appearing, it is final and concludes creditor. The bankrupt assumed all risk and hazard of failure, the trustee none, and in justice to the former he is entitled to whatever success was achieved” (Tr. p. 32).

The court disregarded the fact that the trustee had made no effort to have the bankrupt turn over this crop or its proceeds for the benefit of the creditors. He has always maintained the position that this crop was exempt. He states in his testimony that he was so advised by the bankrupt's attorneys.

The court was also evidently impressed with the idea that the laches of the trustee bound the creditors, and concluded that the trustee was estopped, and that therefore the creditors were also estopped. This idea was probably based upon the language of the court in the case of *In re Hansen*, ¹²⁷~~140~~ Fed. 252, cited in the brief for the bankrupt. This conclusion could only arise from the application of the principle that the trustee is agent for the creditors and that knowledge of an agent is always knowledge of the principal. The court in the case last cited, and the court below herein, failed to recognize the principle often announced by the federal courts that under the Bankrupt Act of 1898, the trustee does not stand in the relation of an agent of the creditors. The relationship between the trustee in bankruptcy and the creditor under the Act of 1898 is that of trustee and *cestuis qui trustent*. This from its very nature precludes the relationship of principal and agent. The trustee is at least a *quasi* officer of the

court, and is not bound by the actions, orders or directions of the creditors. This of itself precludes the relationship of principal and agent.

Under the Bankruptcy Act of 1867, a trustee was properly held to be the agent of the creditors, because they had full control, not only over the proceedings in bankruptcy but also over the trustee himself. There is no provision corresponding to this in the Act of 1898, and such relationship does not exist.

In re Columbia Iron Works, 142 Fed. 237;

In re Allen, etc., Co., 133 Fed. 388.

Inasmuch as under the Act of 1898 the trustee in bankruptcy is beyond the control of the creditors and is a *quasi* officer of the court, it would indeed be a strange doctrine to hold the creditors liable for his acts or knowledge. The trustee is charged with the duty of correcting the schedules of a bankrupt, the creditors have nothing to do with it. Suppose the trustee knowingly permits a large amount of the bankrupt's property to be omitted from the schedule of assets. Suppose no creditor has knowledge of the existence of such omission. To hold that the creditors should lose their claims upon such assets would so clearly be inequitable that it cannot stand as the law.

We therefore confidently submit that your petitioner was not guilty of such laches as would preclude it from receiving the relief sought by its petition.

II.

WAS THE GROWING CROP OF WHEAT AN ASSET OF THE
BANKRUPT WHICH PASSED TO THE TRUSTEE FOR THE
BENEFIT OF CREDITORS?

In order to properly determine this question a careful examination of the Bankrupt Act seems necessary.

Under Section 70, Subdivision A, the trustee is vested by operation of law with the title of the bankrupt to all

“property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.” (Excepting, of course, property exempt under the Bankrupt Act.)

It has been held that by virtue of the above quoted language, an adjudication in bankruptcy brings all the property of the bankrupt, wherever situated, *in custodia legis*, and the court acquires full right and jurisdiction to administer the estate.

Knauth et al. v. Latham Co., 219 Fed. 71;
Lazarus v. Prentice, 234 U. S. 266.

It will be noticed that the language of Section 70, Subdivision A, above quoted, is in the alternative, and if the bankrupt is possessed of any property “*which he could by any means have transferred*”, it passes to the trustee, as well as all of the property which “*might have been levied upon and sold under judicial process against him*”.

In re Burnett Co., 29 Am. Bnk. Reg., 872.

In this case the bankrupt claimed as exempt an undivided one-half interest in a growing wheat crop.

The trustee declined to set it aside, and the Referee entered an order sustaining him. The bankrupt based his claim on a statute of Tennessee which prohibited a levy upon a growing crop until November 15th of each year, being after the maturity of the crops. The statutes of exemptions of that State did not include growing crops among exempt property. The State court had recognized the right to sell or mortgage growing crops. The federal court said:

“It therefore follows that, not being exempt property and property which the bankrupt could have transferred at the time the petition was filed and the adjudication in bankruptcy made, title thereto must be held to have passed to the bankrupt, under provisions of Section 70 of the Bankrupt Act.”

The Supreme Court of Montana has always recognized the right of the owner to mortgage growing crops.

Ford v. Sutherlin, 2nd Mont. 440;

Brande v. Babcock, 35th Mont. 256.

The same right is recognized by the statute of Montana.

Revised Code, Secs. 5773, 6824 and 6826.

Growing crops are not mentioned in the statute of exemptions of the State of Montana.

The court below held that crops growing on land included in a homestead entry were not property of the character which could vest in a trustee in bankruptcy. It is beyond our comprehension to understand why not. A crop growing on a home-

stead entry is not endowed with any peculiar sanctity, because of that circumstance, nor does any peculiarity of title or right attach to it. The homesteader is entitled to the possession of the land and all the fruits thereof so long as he complies with the provisions of the homestead law. He may raise any crop he desires and such crop is his own property. From the time the seed is placed in the ground, such ownership exists, and it continues during the germination of the seed and throughout its growth and ripening. It is always his own, and clearly comes within the common law designation of *fructus industriales*. He may sell, mortgage or do what he pleases with it. It may be seized, levied upon and sold by his creditors at any time. This has always been the rule of the common law.

Evans v. Roberts, 5 Barn. & Cress, 829;

Swafford v. Spratt, 67 N. W. 701;

Phillips v. Keysand, 56 Pac. 695;

Johnson v. Walker, 37 N. W. 640;

Polley v. Johnson, 35 Pac. 8;

Ayers v. Hawk, 11 Atl. 744.

It is impossible for us to understand why any difference should exist between the land held under a homestead entry and the land held under a contract of purchase from an individual owner. Unless the contract is complied with in the latter case, the person loses possession of the land, while in the former case he loses possession by failure to comply with the homestead law. The legal effect of non-compliance is the same in each case.

We cannot agree with the court below in its construction of Section 70 of the Bankrupt Act, wherein it limits the operation of its provisions to “property capable of change of ownership or enjoyment without recourse to or draft upon property and labor of the bankrupt”. Section 70 provides that *all* property of the bankrupt which he could by any means have transferred or which might have been levied upon or sold under judicial process should pass to the trustee for the benefit of creditors. That the bankrupt could have sold and transferred this crop is, we submit, beyond question, and if he could have sold the same it might be levied upon by his creditors. The effectuality of a sale or of a levy is not the standard for the determination of *the right to sell or to make a levy*. Such right is determined by the ownership of the property. If the right of sale or levy exists, then the property passes to the trustee, irrespective of the question of what may be realized therefrom.

We are also of the opinion that the court erred in holding that

“when the bankruptcy petition was filed, this crop had no separate existence. It was in the nature of an incident that followed the land. Its value was potential only—that might be created by the land and future labor. Of itself it had no transfer value”.

We can conceive of no legal distinction between the law applied to this case and other cases of growing crops. There can be no doubt but that the bankrupt might sell growing crops to anyone.

If so, such crops were capable of separation from the land and would have a separate existence. Whether it could be levied upon is immaterial under Section 70, but in our opinion such levy could have been made.

It is difficult to understand why any distinction should be made between this case and one where crops are growing on a statutory homestead, which is exempt under the Bankrupt Act. In such instance no creditor could claim that the land passed to the trustee; no creditor would have the right to the labor of the bankrupt in maturing, harvesting and marketing the crop. Yet the authorities are uniform in holding that in such cases the title to the crop would pass to the trustee.

It is equally difficult to conceive how the court could conclude that this crop was not subject to levy and sale,

“because otherwise the owner thereof might be prevented from performing the conditions precedent, of which was cultivation of the crop, with the government”.

How could a levy or sale of the growing crop possibly prevent or interfere with a bankrupt's performance of the necessary conditions precedent to his right to the homestead? He would still retain the possession of the land. It would still be producing and bearing crops. All the requisites of the United States Homestead Act would be complied with. The only possible difference would be that the entryman would be deprived of his crop, but we know of no statute which this would violate and

cannot understand how it could possibly endanger his homestead right. That the bankrupt could abandon his homestead rights, plow up the crop, or otherwise destroy it, is immaterial, because such acts *would only go to the value of the right* sought to be gained by the levy, and not *the right itself*.

The rights of the bankrupt in growing crops has been before the federal courts many times, as shown by the following authorities:

In re Sullivan, 148 Fed. 115;

In re Daubner, 76 Fed. 805;

In re Frederick, 28 Am. Bnk. Reg. 656;

In re Hoag, 97 Fed. 503.

In re Hoag, 93 Fed. 422.

In each instance the federal court has held that the growing crop passes to the trustee in bankruptcy.

In re Sullivan, supra, the court held that crops of ripe grain growing on a homestead are not exempt unless made so by the State statutes or decisions. The bankrupt in that case claimed the crop was exempt because it was the product of exempt property, namely, his homestead. The court said:

“If all growing crops upon an exempt homestead are *ipso facto* exempt anyone may secure a homestead near a large city, expend much money in seed, in fertilizing the ground and in growing and harvesting the crops, and in that way secure large returns from vegetable and other products, sell them in a convenient and available market, accumulate a fortune and successfully defy creditors. Such possibility demonstrates that the theory of law which makes it possible is probably not sound, and in-

duces fraud from a construction of the statute, if the same could be reasonably done, which will not permit it.”

In re Hoag, supra, the court holds that where the State statute exempts a homestead the bankrupt cannot claim as exempt, in addition thereto, the crops growing on the land at the time of filing his petition in bankruptcy. The court said:

“Growing crops are personal property in law. Although on a sale of the land without reservation, they go with the land because the implication is clear that such is the intention, they pass by bill of sale or chattel mortgage without sale, and even by oral agreement, and may be levied upon by execution or attachment as personal estate, and on the death of the owner descend to his personal representatives, and not to his heirs. It is also claimed that the crops are exempt as being the product of a homestead which is itself exempt. If this be so it would follow that cattle, horses, and other stock grown on the homestead are also exempt for the same reason. So that it would be possible for a thrifty debtor with an eye to business to easily double or quadruple the exemptions enumerated by the statute.”

In re Daubner, supra. This case holds that land acquired under homestead law of the United States cannot be subject to bankruptcy proceedings for the payment of any debt contracted before the issuance of patent, yet crops growing on such homestead at the time of the adjudication of a voluntary bankrupt, are not exempt but pass to the trustee for the benefit of creditors. The court said:

“While for many purposes growing crops are held to be a party of the realty yet in many

cases they have been treated as personalty and held liable to attachment or execution and levy and sale. Upon a sale of the land the growing crops, unless reserved, would pass to the purchaser, but they are capable of reservation and of mortgage and sale to the owner of the land, and when such owner voluntarily goes into bankruptcy he must be held to the intent that such of his property and rights as are the subject of disposition by him, and are not necessarily exempt, shall vest in the trustee for the benefit of creditors. Such crops are the fruits of the bankrupt's industry or of his investment of money, or both. It would be productive of great injustice if the owner of a homestead is permitted to spend his money upon exempt land, and then between such time and harvest procure a discharge in bankruptcy, and so reap what was sown at the expense of the creditor. By such device the bankrupt might secure a discharge from his debts and retain his property, with its increase, and the bankruptcy law be made a mistreatment of law."

We therefore submit that the order of the order of the District Court of the United States for the District of Montana reversing the order of the Referee, be itself reversed, and the order of the Referee reinstated.

Dated, San Francisco,
October 15, 1915.

Respectfully submitted,

JOHN B. CLAYBERG,

Attorney for Petitioner.

No. 2628.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

OLMSTED-STEVENSON COMPANY,
a corporation,

Petitioner,

VS.

R. S. MILLER, Bankrupt,

Respondent.

In the Matter of R. S. MILLER, Bankrupt.

RESPONDENT'S BRIEF

LEWIS P. FORESTELL,
Attorney for Respondent.

Filed this.....day of October, A. D. 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2628.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLMSTED-STEVENSON COMPANY,
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Respondent.

In the Matter of R. S. MILLER, Bankrupt.

RESPONDENT'S BRIEF

Respondent has filed a motion herein to dismiss the Petition upon the grounds and for the reasons set forth in the motion (Record 36-37).

Without waiver of any of the grounds set forth in the motion, respondent submits that said petition does not state facts sufficient to entitle petitioner to the relief prayed or to any relief.

There does not appear in the record herein a statement of any findings of fact made by the District Court, if any were made, and it does not appear from the record whether the matter was heard in the lower Court solely upon the evidence taken before the Ref-

ree or whether other additional evidence was presented.

"The record should include a statement of the findings of fact and conclusions of law by the court below, or its equivalent, and *not a certified copy of the evidence itself. The opinion of the court is not sufficient for this purpose*, and may only be referred to for the purpose of ascertaining what propositions of law governed the court in which the opinion was filed."

In re Richards, 96 Fed. 935, 37 C. C. A. 634;

In re Taft, 133 Fed. 511, 66 C. C. A. 385;

Steiner vs. Marshall, 140 Fed. 710, 72 C. C. A. 103;

In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338.

The record will not be considered where the transcript contains neither an agreed statement of facts nor findings of fact. (This was a petition for review of an order reversing an order of a referee disallowing a secured claim.)

Landing vs. San Antonio Brewing Assn., C. C. A., 5th Cir., 20 A. B. R. 226.

"The allegation in the petition for review in this court is no evidence of such fact; nor is the allegation referred to put in issue. The Court is confined to the record attached to the petition or sent up in connection with the proceedings to review."

In re Rodarmour, (C. C. A., 6th Cir.), 177 Fed. 379;

In re Boston Dry Goods Co., (C. C. A., 1st Cir.), 125 Fed. 226.

In the case last above mentioned it is said by the Court:

“As we have already said, the petitioners assume that the opinion of the learned Judge of the District Court states the findings, rulings and orders of that Court. This, as we have said, forms no part of the record, so that there are no findings of that Court in any proper sense of the word. (The decree of the Court is general in its terms, not containing any findings.) The record discloses no application to the district court for specific findings of fact, so that in all respects, the record is as the petitioners saw fit to make it. In this particular case we should not undertake to revise the findings and conclusions of the Referee. The petition in this case is dismissed for the foregoing reason.”

In re Pettingill & Co., supra, it is said:

“This Court is not authorized to revise the findings of the Referee but only those of the District Court, and the record must contain a statement of the ultimate facts as will enable us to dispose of its proceedings on mere questions of law. The opinion filed by the judge does not present findings of fact of the character described in our decisions, unless made a matter of record by order of the Court in which it is passed down.”

In re Taft, supra, it is said by the Court:

“It is not unusual for the record to include the whole of the evidence instead of a statement of ultimate facts as found by the Referee or Judge, and this is improper *because this Court cannot review the evidence to determine the facts*, but is limited to reviewing the questions of law neces-

sarily raised and decided upon the facts found by the Court of Bankruptcy."

To the same effect see *Steiner vs. Marshall, supra*.

It seems to be the plan of petitioner here to ask this Court to decide as a matter of law that the evidence herein is insufficient to justify the order of the District Court. That the Court cannot do in this proceeding, for the reasons above stated, and for the further reasons that this Court cannot review the evidence because there is nothing in the record to show that *all* the evidence is contained therein.

Alkon vs. United States, (C. C. A. 1st Cir.)
163 Fed. 810.

PETITIONER IS ESTOPPED FROM NOW BRINGING FORTH THE MATTERS UPON WHICH IT SEEKS A REVISION.

It appears from the petition filed herein that in February, 1914, the petitioner was adjudicated a bankrupt (Petition 29); that in April he was discharged in bankruptcy, and thereafter the Referee in Bankruptcy made an order citing the bankrupt to show cause why he should not amend his schedule by incorporating therein a crop of wheat planted upon his United States homestead, and that he be required to deliver same to the trustee in bankruptcy.

The petition alleges among other things:

"XI.

"That at the time of filing the schedule of property owned by him as aforesaid, and at all times

thereafter, the said R. S. Miller, KNOWINGLY, AND FRAUDULENTLY, CONCEALED SAID PROPERTY, and KNOWINGLY AND FRAUDULENTLY FAILED AND NEGLECTED TO INCLUDE THE SAME IN THE SCHEDULE OF PROPERTY filed by him, and failed to surrender the same for the benefit of his creditors, and that said property was not delivered up or surrendered by said Miller, for the use and benefit of said creditors.

"XII.

"That neither your petitioner, nor any of its officers or employees had knowledge of the failure of said R. S. Miller to include said crop in his schedule of property until on or about the 18th day of September, 1914, etc." (Pet. 5-6.)

Upon these and other allegations issue was joined by the bankrupt, who, in addition to denying them, alleged, among other things:

"That at all the times mentioned in the answer, B. N. Stevenson was the secretary-treasurer of the Olmsted-Stevenson Company, and Jos. C. Smith was one of its attorney, representing its interests as a creditor of this bankrupt.

"That at the time of the filing of this bankrupt's petition and schedules, and at the time of his adjudication as a bankrupt therein, the said petitioner, Olmsted-Stevenson Company, and its agents and servants knew and ever since have known, that said crop was upon said lands and that this bankrupt owned and was in possession of said crop, and that the said Charles W. Conger, after his appointment and qualification as trustee herein as aforesaid, and prior to the making of an order by the said trustee, setting apart to this bankrupt his exemptions and prior to the date upon which this bankrupt was discharged as

aforesaid, well knew that said crop was upon said lands and premises aforesaid and that this bankrupt claimed to be and was the owner thereof, and that this bankrupt, after the appointment and qualification of said trustee and before the order setting apart to this bankrupt his exemptions, told said trustee that said crop was upon said lands and that he, the said bankrupt, was the owner thereof, and that said trustee before making said order, considered said matter and consulted with the said Olmsted-Stevenson Company, its agents, attorneys and servants, and was advised by the attorney for said Company that said crop was a part and portion of said real estate, and as such, belonged to the bankrupt, and that said trustee thereupon told the attorney for this bankrupt that said crop was a part of and admitted to be a part of said real estate, and as such exempt to said bankrupt, and that he would make an order setting apart to this bankrupt said real estate as exempt.

“That this bankrupt honestly believing that said crop was a part of said real estate, and as such was not entitled to be administered by said trustee for the benefit of said bankrupt’s creditors herein, remained in POSSESSION OF SAID CROP, TOOK CARE OF, HARVESTING AND THRESHING SAID CROP AND EXPENDED LARGE AMOUNTS IN TAKING CARE OF, HARVESTING AND THRESHING SAID CROP, IN WORK, LABOR, MATERIALS AND MONEYS EXPENDED; THAT SINCE THE THRESHING OF SAID CROP, HONESTLY AND IN GOOD FAITH BELIEVING THAT SAID CROP WAS NOT ENTITLED TO BE ADMINISTERED FOR THE BENEFIT OF HIS CREDITORS HEREIN, has sold and disposed of a large portion of said crop and has laid out and expended the proceeds thereof, etc.

“That the said petitioning creditor herein, WITH FULL KNOWLEDGE OF ALL THE FACTS IN

THIS CASE AS AFORESAID, CONSENTED, ADVISED AND KNOWINGLY PERMITTED SAID TRUSTEE TO PROCEED WITH THE ADMINISTRATION OF SAID ESTATE AND SET ASIDE TO THIS BANKRUPT HIS EXEMPTIONS INCLUDING THE REAL ESTATE UPON WHICH SAID CROP WAS GROWING, AND TO PERMIT THIS BANKRUPT IN GOOD FAITH TO EXPEND HIS LABOR, TIME, MATERIAL AND MONEY IN TAKING CARE OF, HARVESTING AND MARKETING SAID CROP, AND THAT BY REASON THEREOF, SAID PETITIONING CREDITOR IS ESTOPPED FROM CLAIMING OR REQUIRING THIS BANKRUPT TO SURRENDER SAID CROP OR TO SURRENDER THE PROCEEDS OF SAID CROP IN ORDER THAT THE SAME MAY BE ADMINISTERED AND DISTRIBUTED TO THIS BANKRUPT'S CREDITORS HEREIN." (Pet., pp. 12, 15-17.)

Then follows allegations as to the value of the work, services, materials furnished and money expended by the bankrupt, and the value of the use of the land upon which the crop was grown, etc., in raising, maturing, harvesting, threshing and caring for the crop and showing its exempt character.

It will be observed that the charge made against the bankrupt by the creditor was fraudulent concealment of property and this is one of the grounds upon which the creditor might have opposed the discharge. Sec. 14, Bankruptcy Act; 32 Gen. Order in Bankr.

The objection now raised being open to the creditor when the bankrupt applied for his discharge and the bankruptcy law providing for the manner of making it, he has waived his right, and cannot now bring the matter forward after the discharge and without moving to set aside the order of discharge. This order

until revoked is binding and is *res adjudicata* not only as to every matter offered or received to sustain or defeat it, BUT AS TO ANY OTHER ADMISSIBLE MATTER WHICH MIGHT HAVE BEEN OFFERED FOR THAT PURPOSE. *Cromwell vs. Sac. County*, 94 U. S. 351, 24 L. Ed. 195.

In petitioner wanted to rely upon the matters set up in its petition, its remedy was to apply to the court to revoke the discharge. (Sec. 15, B. Act.)

“THE SUMMARY JURISDICTION OF THE BANKRUPT COURT OVER THE PERSON OF THE BANKRUPT CEASES ON THE GRANTING OF HIS DISCHARGE FROM HIS DEBTS, AND HE CANNOT THEREAFTER BE REQUIRED BY SUMMARY ORDER TO SUBMIT TO EXAMINATION TOUCHING HIS PROPERTY ALLEGED TO HAVE BEEN CONCEALED OR FRAUDULENTLY TRANSFERRED.”

In re Dole, Fed. Case, No. 3964, 11 Blatch. 499;

In re Jones, Fed. Case No. 7449;

In re Wittaski, Fed. Case No. 17,920.

It is said in the brief of the petitioner that unless the bankrupt “has changed his position relying upon the non-action of this petitioner, so that the granting of the order would be inequitable, the question of laches amount to nothing.”

No challenge to pleading or evidence by demurrer, objection or otherwise was made on this ground in the Court below, and it cannot be raised here for the first time.

A fair construction of the pleadings and evidence is that even before the filing of the bankrupt’s peti-

tion at all and for several months afterwards, the petitioner and its agents and servants, know about the crop; it was disclosed at the first meeting of creditors, and the bankrupt then told Mr. Stevenson (the secretary-treasurer of petitioner—Pet. 8, 43) about it. (Pet. 70.) He told Mr. Stevenson about it before he filed his petition. (Pet. 60, 52-54.) The trustee asked Mr. Smith, attorney for petitioner, whether the crop was exempt and was advised that it was because a part of the real estate. (Pet. 63, 68.) In fact it was admitted by Mr. Smith that he gave advice that the crop was realty until severed from the ground. (Pet. 82-83.)

The petitioning creditor has had its day in court and its opportunity to appear and object to the bankrupt's discharge upon the same ground now urged. It was notified of the hearing upon the petition for discharge. (58a Bankr. Act.) The evident reason it did not then do so was because the crop had not at that time reached that state of maturity whereby it could be ascertained whether it would net a profit or a loss. Later in September, when it appeared that the crop would net a profit, these proceedings were instituted. Had it been a failure, would the petitioner have come forward and offered to compensate the bankrupt for his loss? Would it then have offered to pay the bankrupt the reasonable rental value of the land, or to pay him for his services and expenses? It is needless to say that in the event of a loss this proceeding would not have materialized.

What a monstrous equitable doctrine the petitioner advances. It asserts the right to stand in court first on one foot and then on the other. To speculate as to which position would be most advantageous to it.

“It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”

David v. Wakelee, 156 U. S. 680, 39 L. ed. 578, 584.

It is not reasonable to suppose that the bankrupt would have harrowed the grain (Pet. 51) and have cared for it and harvested it unless he believed that the trustee would not claim it and that the petitioner would not claim it, and was he not justified in so believing, when its attorney had advised that it was exempt as a part of the realty? The bankrupt may rely not only on the evidence but upon all legal inferences from it.

Of course, the record does not show that the evidence is all here in this petition, or that no new evidence was introduced before the District Court. The certificate of the clerk fails to disclose that the evidence is full or complete. (Petition, p. 83.)

It is said in petitioner's brief “Whether the evidence introduced is sufficient to sustain the order sought to be reviewed is a question of law.” Whether

there is any evidence is a question of law. The evidence cannot be weighed in this proceeding, for the reason that it is not shown to be all here, and further, the evidence is conflicting, and the nature of the proceeding will not permit of it. Only questions of law may be reviewed.

In re Grassler vs. Reichwold, (this Court),
18 Am. B. Rep. 694.

"All presumptions are in favor of the order, and where evidence is not in the record (or where the record fails to disclose that it contains all the evidence) it will be presumed the facts were sufficient to sustain the order, 'and finding'."

Alkon vs. U. S., (C. C. A.), 163 Fed. 810;
In re O'Connell, 127 Fed. 838;
Sec. 2951, Rem. Bankr.

The evidence could only be looked to to ascertain whether the findings were wholly unsupported, and not for the purpose of weighing the evidence or reconciling any conflict, and since there is no finding in the record, nor any agreed statement of facts, or any equivalent, it cannot be made to serve that purpose.

Hall vs. Reynolds et al., (C. C. A., 8th Cir.),
34 Am. B. Rep. 707-8.

It is conceded in petitioner's brief "That it would be only equitable and right that the bankrupt be allowed to retain out of the proceeds of this crop every dollar he has spent in caring for, harvesting and marketing the same, and reasonable compensation for and

time or labor expended, together with a reasonable rental for the land upon which this crop was growing. We have no doubt that he acted in good faith and upon the advice of his attorneys."

It might be added that the same advice was given by the petitioner's attorneys. (Pet. 63, 68, 82, 83.)

The answer to this is tersely and logically contained in the opinion of the trial court as follows:

"It will not do to concede payment out of the crop for such of the bankrupt's land and labor. The Bankruptcy Act does not authorize either to be commandeered; and if the crop failed or was destroyed at harvest, from where would come this payment? The bankrupt having a right to exclusive use of his homestead land, no levy and sale could prevent him from lawfully replowing and reseeding the land after his bankruptcy petition was filed. To property of this evanescent quality no levy could attach. The case is distinguishable from those wherein it has been held that growing crops are so far personal property that though upon lands exempt by state law, they are subject to levy and sale; for in these latter the personal obligation of the owner of the land continues until after the crop is matured and severed, and the creditor, until paid, has claims upon the fruits of his debtor's exempt land and labor. In bankruptcy it is otherwise. The debtor's personal obligation is extinguished at adjudication, and thereupon his exempt and after acquired property are free from creditor's claims though never paid. To the argument of possible injustice, in that a homestead entryman might devote such labor and money to put much land to crop, and then invoke bankruptcy between seed time and harvest, it may be responded,—No more than if he erected buildings and fences, cleared, ditched and broke the

land, none of which would inure to the benefit of his estate in bankruptcy."

It is said in petitioner's brief that "it was insisted in the court below that the trustee was the agent for the creditors and that he, the trustee, was guilty of such laches as to prevent him from claiming this crop as a part of the bankrupt estate, and that it appears from the opinion of the court below that he coincided with the view that the trustee was guilty of such laches as to bar petitioner."

Nothing is said about this in the opinion of the Court, except this:

"Another sufficient reason for the conclusion herein is that, by standing by and permitting the bankrupt to devote his time, money and labor to maturing the crop as his own, the trustee is now estopped to claim it. He made his election. No fraud appearing, it is final, and concludes creditors. The bankrupt assumed all risk and hazard of failure, the trustee none, and in justice the former is entitled to whatever success was achieved. It goes without saying that, if the crop had failed, this proceeding would not have materialized, and no one would propose compensating the bankrupt for his loss."

It was not necessary for the court to find a strict agency between the trustee and creditors. The petitioner's secretary-treasurer, Mr. Stevenson, knew all about the crop, even before the petition in bankruptcy was filed. (Pet. 52-54-60.) The petitioner's attorney, Mr. Smith, knew about it, and advised the trustee that it was exempt "because it was a part of

the real estate." (Pet. 63, 68.) And the trustee does represent the creditors, he is elected by them, he stands to them in a fiduciary relation, he holds the estate primarily for them, and IT IS HIS DUTY TO FURNISH SUCH INFORMATION CONCERNING THE ESTATE AND ITS ADMINISTRATION AS MAY BE REQUESTED BY PARTIES IN INTEREST. B. Act, sec. 47 (a) 5.

In re Sauer, 122 Fed. 101;

In re Lowensohn, 121 Fed. 539;

In re Wrisley & Co., 133 Fed. 388 (C. C. A.).

The legal presumption is that he regularly performed his duty. The knowledge of the trustee is also the knowledge of the creditors. *In re Hansen*, 107 Fed. 252. There is nothing in either *In re Columbia Iron Works*, or *In re Allen etc. Co.*, cited by the petitioner, which in any way militates against this view.

In the Hansen case, *supra*, at page 254, the Court said:

(Application to revoke discharge—to reach other property.)

"Moreover, this petition comes too late. It is not claimed that any fraud has been perpetrated by Hansen upon the creditors, or that there has been any concealment by him in the premises. The trustee in bankruptcy represents the creditors. He was fully informed of all the facts in relation to Hansen's right. His information was that of the creditors by whom he was elected. I am convinced that these creditors, knowing all the facts, believed that Hansen had no right, in view of the adverse decision of the land office

in this tract of land; and they were willing while the situation remained as it was, that Hansen should have his discharge in bankruptcy. The reversal of the decision of the local land office by the commissioner and the secretary of the interior accounts for the petition that has been filed. The application to set aside the discharge is denied."

To summarize: The petitioning creditor well knew all about this crop, even before the filing of the petition in bankruptcy; knew that it was not separately listed in the bankrupt's schedules; and that it was claimed as exempt by the bankrupt as a part of the homestead; that petitioner's attorney had so advised the trustee; that the trustee set aside the homestead as exempt, believing that the crop passed with it as a part of the exemption; that by the conduct of the petitioning creditor, its attorney, and the trustee, the bankrupt was led to believe that the crop was exempt as a part of the homestead, and thereafter he harrowed it, and devoted his time, labor and money, in maturing, harvesting and marketing it; that he was discharged in bankruptcy without any objection, so far as the record shows, on the part of the petitioning creditor.

Respondent, therefore, respectfully submits that the creditor having full knowledge of the facts and having stood by and permitted the bankrupt to devote his time, labor and money, in maturing, harvesting and marketing the crop, as his own, he has proven the allegations of his answer, to which no objection

was made below, that the petitioning creditor failed to prove the allegations of its petition, the trustee, who has succeeded to the legal title to the bankrupt estate, and the creditor, are estopped to now claim it. And that from their misleading silence with knowledge or passive conduct it became their duty to speak; that it was fair to equate their silence with a declaration that neither the trustee nor the petitioning creditor had any interest in the planted crop.

Bigelow on Estoppel, Sec. 4, p. 648 (6th ed.).

And this defense is favored by the federal courts.

Lasher vs. McCreery, 66 Fed. 834, 840;
St. Paul etc. R. Co. vs. Sage, 49 Fed. 315, 326,
 1 C. C. A. 256;
Halstead vs. Grinnan, 152 U. S. 412, 14 Sup.
 Ct. 641, 38 L. Ed. 495.

As stated in the third and fourth grounds of the motion to dismiss, the petition to revise on this ground, involves the decision of a controverted issue of fact, which cannot be decided in this proceeding; and the facts are not before the court from which the court below drew its conclusions of law, or made its order, stated as the seventh ground. (Pet. 36-37.) For these reasons the motion to dismiss the petition should be sustained.

Without waiver of the foregoing reasons why the motion to dismiss the petition should be sustained, respondent submits that the question, WAS THE GROW-

ING CROP OF WHEAT AN ASSET OF THE BANKRUPT WHICH PASSED TO THE TRUSTEE FOR THE BENEFIT OF CREDITORS, should be answered in the negative.

In the petitioner's brief it is claimed that because a growing crop can be mortgaged, it is, therefore, property the title to which vests in the trustee by operation of law under the Bankruptcy Act, but this begs the question, for if the property is exempt, then the Act itself excepts it from its operation, and it does not pass to the trustee. (Sec. 70 B. A. s. d. (a). Exempt property does not pass to the trustee in bankruptcy, nor does it become a part of the estate for distribution among the creditors.

Bank of Nez Perce vs. Pendel, (this Court),
193 Fed. 917;
Lockwood vs. Exch. Natl. Bank, 190 U. S.
294, 47 L. ed. 1061.

Moreover, exempt property may be transferred or mortgaged, but that is not determinative of whether or not it is exempt.

It is conceded that the United States homestead is itself exempt. But if the reasoning of the petitioner were logically carried out, it would not be exempt, because it may be mortgaged and the mortgage would be valid even if made before receiver's receipt. *Fuller vs. Hunt*, 48 Iowa 163; *Lang vs. Morey*, 40 Minn. 396.

Forgy vs. Merryman, 14 Neb. 513;
Orr vs. Ulyatt, 23 Nev. 134;
Spiess vs. Neuberg, 71 Wis. 279;
Klemp vs. Northrup, 137 Cal. 414.

It said that the Supreme Court of Montana has recognized the right to mortgage growing crops. But the courts of all the states recognize the right of a homesteader on public lands to mortgage the homestead before patent.

Please see the decisions from the different states cited in note to Sec. 2296, Vol. 6, Fed. Stat. Ann., p. 308.

And if mortgageability of the crop is to be the test, then the homestead would not be exempt. The reasoning applies with equal force to one as well as the other.

It is also said by petitioner in his brief that growing crops are not mentioned in the statute of exemptions of the State of Montana. Neither is United States homesteads. But seed and grain, not exceeding in value the sum of \$200, actually provided or on hand, for the purpose of planting or sowing the following spring is mentioned as exempt. Rev. Codes Mont. 1907, sec. 6825. Is the grain any the less exempt because planted?

The Court's attention is called to Sec. 2296, Rev. St., Vol. 6, Fed. St. Ann., page 307, which reads:

“(Homestead lands not subject to prior debts.) No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor.”

Residence upon the land and cultivation are by the federal statutes made conditions precedent to patent. Failure to perform these conditions causes the land to

revert to the government. Since the entryman must reside upon the land, he must be allowed to make a living by tilling the soil, and it was, unquestionably the intention of Congress that there should be included in the exemption the beneficial use of the land. A failure to reside on the land causes the land and crop growing thereon to revert to the United States. *And this distinction is important, as marking the difference between this character of a homestead and that allowed under state statutes.*

It is said by petitioner in its brief that the crops may be sold, mortgaged, seized and levied upon. The cases cited do not involve the question of a crop upon United States Government homestead.

It is said by petitioner:

“It is impossible for us to understand why any difference should exist between the land held under homestead entry and land held under contract of purchase from an individual only. Unless the contract is complied with in the latter case the person loses the possession of the land, while in the former case he loses possession by failure to comply with the homestead law. The legal effect of non-compliance is the same in each case.”

It is also said:

“It is difficult to understand why any distinction should be made between this case and one where crops are growing on the statutory homestead, which is exempt under the bankruptcy act. In such instance no creditor could claim that the land passed to the trustee. No creditor would

have the right to the labor of the bankrupt and maturing, harvesting and marketing the crop, yet the authorities are uniform in holding that in such cases the title to the crop would pass to the trustee."

It occurs to us that there is a vast difference in the two cases. The state homestead is created upon property already possessed by the beneficiary. The federal homestead is donated to him by the government on certain conditions, while the state homestead is exempt from ordinary debts of the owner contracted after notice and not from antecedent debts, the federal homestead is exempt from debts antecedent to the acquisition of title and not from those subsequent. Land is donated to the settler on the condition of limitations prescribed by the statute, provides for occupancy, cultivation, etc. The principles governing the benefits conferred under the homestead laws of the United States are other than those controlling state exemptions. From the date of entry to that of patent, the homestead is not liable for any debts of the occupant for the reason that he does not own it. Title is in the United States. *A private citizen in making a contract with an individual cannot confer land in fee simple upon a donee* which shall not be liable for the latter's debts; cannot make non-liability a condition for he has no control over the subject, but the United States can, and does, donate its public land to settlers and makes the property free from existing debts. The exemption is based upon the prin-

ciple of the sovereign right to protect the donation after it has been bestowed. This the individual has no right at all to do. The government, therefore, has the right to exempt the homestead from antecedent debts after ceasing to own it. The individual has not.

The United States statute has been construed "to be manifestly intended for the protection of the entry-man, to prevent the appropriation of the land *in invitum* to the satisfaction of debts incurred anterior to the issuance of patent."

Lewis vs. Wetherell, 36 Minn. 386;
Orr vs. Stewart, 67 Cal. 275.

It has been generally held that all improvements made by the settler become a part of the real estate so that a mechanic's lien for work and labor does not create a lien upon the property or the building, for the settler has yet no title and the government does not become the debtor of the mechanic.

Waples on Homestead & Exemption, Sec. 10,
 p. 952.

The statute concerning homesteads, like other statutes of exemption, is founded upon considerations of public policy, beneficial in their nature, and is therefore to be liberally construed in furtherance of the object intended to be attained.

Thompson on Homesteads, Secs. 4, 7, and authorities there cited.

In determining what constitutes a homestead exemption the reason and spirit of the law must be considered, and such construction given as will include, within the exemption all things coming under that reason and not contrary to the letter of the law, while excluding all things not within that reason, even though apparently within the law. In conformity with this rule, the courts have always been liberal in ascertaining the extent of this exemption, so as to carry the legislative intent into effect. The object of the homestead exemption is not merely to afford a naked shelter to the family, but like all other exemptions to afford it a means of livelihood and thus to prevent its members from being driven by destitution to seek a support from public charity. The policy of the law in this country has always been, so far as possible, to prevent persons, whether through misfortune or improvidence, from becoming a charge upon the public purse; and, to this end, the statutes of exemption have been so framed as to secure to all persons the means of obtaining a support through their own exertions. In view of this fact, it would be absurd to suppose that the Congress intended that, though the land constituted a homestead, the owner should not be allowed to use it for any useful purpose, and if the products of such farm were not exempt then all motives for exertion are withdrawn in the very cases to which the statute was intended to apply, viz.: those in which the owners are in impoverished circumstances.

To construe the federal statute as contended for by the petitioner here would not only defeat its manifest object, but would convert it into an instrument of fraud and oppression.

Upon the theory of petitioner a man might invest \$5000 in a splendid and luxurious mansion, and place it beyond the reach of his creditors, but if he has a little farm worth \$1000 and is content with the humble shelter of a cottage he dare not raise food for his hungry family upon those premises without allowing a rapacious creditor to seize it before it can be used. To so hold would make the statute a mockery.

The exemption laws in the State of Montana have always received a liberal construction by the highest court of that state.

Ferguson vs. Speith, 13 Mont. 487, 34 Pac. 1020, 1021, 1022;

Lindley vs. Davis, 7 Mont. 206, 14 Pac. 717, 720,

at which page it is said:

“A late senator, in advocating in the United States Senate the adoption of the general homestead law, said: ‘Tenantry is unfavorable to freedom. It lays the foundation of separate orders in society, annihilates the love of country, weakens the spirit of independence. The tenant has, in effect, no country, no hearth, no domestic altar, no household God. The freeholder is the only supporter of the free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.’ ”

The cases cited in petitioner's brief to the effect that growing crops are not exempt, but that they pass to the trustee in bankruptcy, are not convincing in support of the proposition contended for by petitioner and all involve the question of the bankrupt's right to the growing crops upon his homestead held under the laws of the state in which he resided.

In re Sullivan corn was matured at the date of bankruptcy and this, as well as other authorities, make a distinction between crops which are matured and those which depend upon the soil for its nourishment and support, as in the case of *Ellithorpe vs. Reidesil*, 71 Iowa 315, 32 N. W. 238, in which it was determined that an execution could not be levied upon *immature* growing crops. The Court observes:

"The whole proceeding was on the theory that the crops were personal property and could be levied on and sold as such. But while they remained immature and were being nurtured by the soil, they were attached to and constituted part of the realty. They could no more be levied upon and sold under execution as personalty than could the trees growing upon the premises."

The Court further said:

"It has been well observed that the value of the growing crops depends upon the soil for its nourishment and support, and, if disconnected at once, as in this case, would be nothing and levy and sale usually afford but little return to the creditors, while it is sometimes serious loss to the debtor."

In re Daubner, so far as the crops on the homestead were concerned a patent to the lands had been issued prior to the proceedings in bankruptcy, and crops were claimed as exempt under the state homestead laws.

The case of *In re Hoag* involves the question as to the bankrupt's right to crops growing upon land set apart and claimed as exempt under state homestead laws.

The rule is laid down as to the extent and scope of the exemption in 21 Cyc. 497, as follows:

"The exemption extends to crops growing upon the land, and according to some decisions to crops which have been severed therefrom. Others, however, hold that the crops are exempt only so long as they are not severed from the soil."

See, also, to the same effect, the following cases:

- McCullough Hardware Company vs. Call*,
155 S. W. 718 (Tex. Civ. App.);
- Neblett vs. Shackelton*, 69 S. E. 946 (Va.);
- Coats vs. Caldwell*, 71 Tex. 19, 8 S. W. 922;
- Morgan vs. Rountree*, 88 Ia. 249, 55 N. W. 65;
- Jewitt vs. Guyer*, 38 Vt. 209;
- Cox vs. Cook*, 46 Ga. 301;
- Alexander vs. Holt*, 59 Tex. 205;
- Parker vs. Hale* (Tex. Civ. App. 1903), 78
S. W. 555;
- Staggs vs. Piland*, 31 Tex. Civ. App. 245, 71
S. W. 762;
- Allen vs. Ashburn*, 27 Tex. Civ. App. 239, 65
S. W. 45;
- Cunningham vs. Coyle*, 2 Tex. Civ. App.
cases, Sec. 422;

Citizens Nat. Bank vs. Green, 78 N. C. 247;
In re Wood, 147 Fed. 877;
In re Cohn, 171 Fed. 568;
 Waples on Homestead & Exemption, p. 242.
 15 A. & E. Enc. Law, 593.

In re Wood it was claimed that only such exemptions in bankruptcy were available as provided by the state law, and the Court finds against this narrow construction.

In the case of *Coats vs. Caldwell*, *supra*, the Court says:

“Upon a levy upon such property the officer must either take possession of the land to gather the crop or must sell it ungathered. In the latter case, the right would pass to the purchaser at the sale to go upon the land and take off the crop. *In order to complete a sale or to make it effective, possession MUST BE TAKEN OF THE LAND UPON WHICH THE CROP IS FOUND, AND FOR A TIME AT LEAST THE OFFICER OR PURCHASER MUST EXERCISE DOMINION AND CONTROL OVER IT. THIS, IN OUR OPINION, IS AN INVASION OF THE HOMESTEAD RIGHT, AND CANNOT BE PERMITTED.*”

In the case of *Neblett vs. Shackelton*, *supra*, the Court says:

“Unless these decisions (referring to certain decisions holding that crops severed from the soil of a homestead are not exempt from execution) are governed by something in the statutes of the states referred to, they strike us as being narrow and technical in the extreme. Of what value unpicked cotton could be to the householder it is difficult to perceive. As long as it remained in the field exposed to the weather and to be utterly wasted, it was protected by the

homestead, but as soon as it was picked and assumed a useful and marketable form, the protection of the homestead was withdrawn and it became subject to seizure by the creditor."

It was pressed upon the Court in *Citizens' Bank vs. Green, supra*, that a homestead having been secured to the debtor by law, all income derived from its use is merely an incident which follows the principal and belongs absolutely to him, and may be used in improving the property or any other improvements, and that unless this be so the law rather discourages than invites improvement and enterprise by cutting off all inducements to industry, the legitimate rewards of which, when in excess of the exemption, would be seized and sold by the creditor.

"That this is true cannot be successfully refuted, and the answer which was made by the Court does not appeal to us. We have no fear that colossal fortunes in defiance of debts past or future will be built up upon the nucleus of incomes derived from a capitalization and recapitalization of the proceeds of crops derived from lands set apart as homesteads."

The Supreme Court of Iowa, has had this subject under consideration in *Morgan vs. Rountree*, 88 Iowa 249, 55 N. W. 65, and also reported in 45 Am. St. Rep. 234, where the conclusion was reached that moneys due for rent of a homestead are exempt from execution. In the course of the opinion, the Court said:

"We think it is in harmony with the evident spirit and purpose of our statute to hold that the

head of a family owning a homestead has a right to hold as exempt not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead. If the homestead is terminated by abandonment or otherwise, the exemption ceases. To hold that the owner of a homestead can only hold as exempt such proceeds of its use as the industry of himself or family has produced would be in many cases to deny the benefits of such exemption entirely. Take the case of an owner who cannot, from any cause, cultivate the homestead garden of 40 acres; there is no good reason why he may not rent them to another, and hold the proceeds exempt for the use of his family. This case furnishes another apt illustration; also the case of one having a spare room in the homestead, who takes lodgers, or one who, having no use for a stable on the homestead premises, rents it to another. We are clearly of the opinion that proceeds derived from the use of the homestead while it remains such are exempt to the head of a family. Whether property purchased with such proceeds, not otherwise exempt, would be subject to execution we do not determine."

This case derives additional value from having been annotated by Mr. Freeman, who in a note says in part as follows:

"As to certain leases of homestead, the object of the statute is not restricted to affording a mere shelter to the family; and perhaps there is no class of which it may fairly be said that the statute did not intend the debtor to have the advantage accruing from the profitable use of the homestead for such purposes as it might be devoted to without impairing its homestead character or aban-

doing all exemption rights therein. The principal case goes further than any other falling within our observation in securing to a debtor the profits of his homestead, accruing when he was absent therefrom. We are not inclined to doubt or criticise it on that account. The claimant has a right to the full use of his homestead, and if he denies himself part of this right and thereby becomes entitled to compensation, as when he lets the whole, or some part of it, the courts, in denying creditors the right to garnish or otherwise subject to execution the proceeds of such letting, inflict no wrong on the creditor. *A case, equitably still less subject to doubt, arises when the owner of an agricultural homestead plants and harvests a crop which his creditor undertakes to seize in satisfaction of a debt. By not restricting such a homestead to the dwelling house and its appurtenances, and in permitting it to extend over lands useful only for the production of crops, the Legislature impliedly expressed an intention to include the beneficial use of those lands in the homestead exemption. It is true that in many instances there is an enumeration of the personal property which a debtor is entitled to retain as exempt from execution, and that the produce of the homestead may exceed this enumeration or be of a different character. Hence some courts have denied that the produce, unless of a character or quantity which would exempt it, is exempt though it had been acquired from other sources. Others affirm that the exemption of a homestead extends to the crops grown thereon."*

It would be inconsistent for the government to say to a homestead entryman, you must live hereon, you must cultivate this land and raise crops hereon, you must devote your time, energy and labor and what-

ever capital you may be able to command in making a living for yourself and those dependent upon you upon this land, and at the same time say to him, your creditors can confiscate your crops which you plant, can deprive you of the living which we require you to make upon this land, can by taking charge of your growing crops prevent you from devoting your labor to the improvement upon this land and making a living for yourself and those dependent upon you.

For the reasons hereinbefore stated respondent respectfully submits that his motion to dismiss the petition to revise should be sustained or an order of this Court made affirming the order of the District Court of the United States for the District of Montana.

Respectfully submitted,

L. P. FORESTELL,

Attorney for Respondent.

No. 2628

in the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

In the Matter of R. S. Miller,
A Bankrupt,

OLMSTED-STEVENSON COMPANY
(a corporation),

Petitioner,

vs.

R. S. MILLER,

Respondent.

John B. Clayberg
Attorney for Petitioner
Reply Brief for Petitioner

Filed

E. D. McLaughlin

No. 2628

in the

UNITED STATES CIRCUIT COURT OF APPEALS

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In the Matter of R. S. Miller,
A Bankrupt.

OLMSTED-STEVENSON COMPANY
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Respondent.

REPLY BRIEF FOR PETITIONER

In reply to respondents brief, the following is suggested by the attorney for the petitioner.

1. To the point that there is no showing in the record that it contains all the evidence considered by the court below, we desire simply to suggest, that in the verified amendment to the petition

it is stated that, "the said district court of the U. S. District of Montana, heard said bankrupts petition for review, upon the testimony returned by the referee and upon the briefs of counsel for the respective parties"(Tr. p. 38).

A motion to dismiss the petition, under the new equity rules, is equivalent to a demurrer under the old practice, therefore everything properly alleged in the petition, is deemed to be true, upon the argument of the motion.

None of the cases cited by respondent on his first point, (Brief pgs.2,3&4) are parallel with or applicable to the case at bar. In each case the record contained no findings of the court below or of the referee, and no testimony which was considered by the referee and by the court, at the hearing of the various petitions. Therefore we submit there is nothing in respondents first point of their brief.

We have found great difficulty in preparing the record on this petition. The Bankruptcy Act makes no provision for the procedure, and many of the different Courts of Appeal of the United States have enacted rules providing what the record should contain, and the procedure whereby the record is completed. We find no such rules in this circuit.

It is said by the Appellate Court in Meyer Drug Company vs. Poptin Drug Company 136 Fed. 936;

"the trustee of the bankrupt's estate moves to dismiss this petition to revise, because it was not allowed by any judge of this lower Court; no bond has been given; the transcript of the record filed is not certified by the clerk of the lower Court; the transcript does not contain the pleadings in which the issues were tried, nor show who are the proper parties to this proceeding the transcript doesnot contain the evidence upon which the findings of the referee were based; the petition to revise was filed more than three months after the entry of the judgment below, and lastly no supersedeas has been granted.

In our opinion none of these grounds are well taken. The Statute allows the petition to revise to be filed on due notice, but provides no rules as to any of the requisites or formalities referred to in the motion to dismiss."

As stated in the argument, if the court is of the opinion that anything further is necessary to complete the record, we ask that we may be allowed to make it complete before the case is decided by the court.

2 As to the estoppel.

(a) Counsel only quote from one paragraph of the original petition filed, wherein is alleged a charge of fraud upon the part of the bankrupt in concealing property. Paragraph 8 of said petition (Tr. p. 5) should also be considered.

In this paragraph there is alleged the omission of the growing crop from the schedules, by the bankrupt, with no allegation of fraud. Paragraph 10 of said petition (Tr. p. 5) alleges that the bankrupt never turned over the growing crop to the trustee in bankruptcy, without any allegation of fraud.

So that we have in the petition, not only the allegation of fraudulent concealment of property, but allegations that the bankrupt failed and omitted to place the growing crop in the schedule of assets and that he never turned it over to the trustee in bankruptcy.

Counsel says that fraud is a ground of opposition to the discharge of the bankrupt, and not having been presented against the granting of the discharge, it is waived. He evidently over looked the proposition that what-ever may be urged against a discharge, may be equally urged in a proceeding to set aside a discharge, especially when the facts upon which the application is based are discovered after the bankrupt has been discharged, as was alleged in the original petition herein. (Tr.p.6). Counsel has evidently over looked the fact that the purpose of the original petition was to revoke the discharge, open the case, and have the bankrupt directed to amend his schedule.(Tr. p.6&7).

(b) Counsel says that we did not raise the question in court below, that the bankrupt had not properly pleaded and proven the estoppel claimed by him and therefore the same can not be urged at this hearing. It is difficult ot con-

ceive how counsel can conclude that this point was not urged at the court below. The record does not disclose what points were urged. But we submit, that, even though it was not presented to the court below, this court has full authority to determine whether the respondent properly pleaded the estoppel claimed or introduced any evidence in support thereof. As stated in the argument, we have been unable to find any proper allegation or any evidence sufficient to sustain the estoppel claimed. Counsel for respondent has not seen fit to direct the attention of the court to any such allegation or evidence. This being the condition, the court must conclude that the estoppel does not exist. With reference to this matter we desire to again call the attention of the court to the propositions announced in our opening brief, that the respondent never claimed that he expended any money or labor upon the growing crop, in reliance upon the inaction of the owner of the growing crop, and never claimed that such ownership arose from an estoppel against petitioner. The court's attention is also again directed to the fact, that respondent kept an accurate and itemized account of all labor and money spent upon said crop, in maturing, thrashing, and marketing the same--even so closely as to include the number of pounds of oats the horses ate while taking care of the crop.

Under all the circumstances we submit that respondent is not entitled to rely upon the estoppel claim.

AS TO WHETHER THE GROWING CROPS

PAID TO THE TRUSTEE

(3) Counsel have apparently misconceived our position upon the main question involved. We have not insisted that, because one might mortgage property, it was not exempt. Such position would have been puerile. We contend that growing crops are not exempt under the statutes and decisions of Montana.

Sec. 6 of the Bankrupt Act, provides that bankrupts are allowed such exemptions as are prescribed by the state laws in force at the time of the filing of the petition.

The Court of Appeal (8th Circuit) in the case *Steele vs. Fuel* (104 Fed. 868), after quoting the provisions of section 6 of exemption in the most absolute and unqualified terms, and that rule is the state law". The Supreme Court of U.S. in the case of *Smalley vs. Langesour* (196 U.S. 93) has said; "The rights of a bankrupt to property as exempt, are those given him by the state statutes."

Counsel have not disputed this proposition. Neither has he asserted that under the statutes of Montana, growing crops are exempt.

Our contention throughout this matter has been, that growing crops are not exempt under the laws of Montana, and therefore, the bankrupt, having a right to sell the same, they pass to the trustee in bankruptcy, as an asset for the benefit of creditors.

Counsel's entire argument on the question herein involved, seems to only to be effort on his part, to convince the court that the growing crop was exempt to the bankrupt and therefore did not pass to the trustee. He does not dispute the proposition that court of bankruptcy, in determining what is exempt to the bankrupt, only recognize the statutes of the state in which the bankruptcy proceedings are instituted and carried on.

Neither does counsel contest the proposition that growing crops are not included in the exemption Statute of Montana.

This being true, this court has not power to hold such crop exempt, and the question involved must be determined by the application of the provisions of Sec. 70 of the Bankrupt Act.

There can be no doubt that the bankrupt might have sold or transferred this growing crop, at any time after the same was planted, and that by such sale, and in order to make same effective, the purchaser would have had the right to enter upon the land to care for, harvest, and remove the crop without being a trespasser. This brings the entire matter clearly within the first clause of subd. a Sec. 70 of the Bankrupt Act.

By filing his voluntary petition in bankruptcy, the bankrupt placed himself in the same legal right results. The trustee would have the right to enter upon the land, care for, harvest, and remove the crop just the same as would a purchaser.

By filing his voluntary petition in bankruptcy it was his duty in consideration of receiving the benefit of the Bankrupt Act, which was thereby sought, to turn over to the trustee, all his property not exempt. The title to such property passed by operation of law, and with this title there was given permission to enter upon the land, care for, harvest, and remove the crop.

In illustration and support of this position we desire to call the court attention to In re Coffman 93 Fed. 422. In that case a certain cotton crop was growing upon a homestead at the time of filing a voluntary petition of bankruptcy. The bankrupt harvested the crop, and the trustee sought to compel him to turn the same over for the benefit of creditors. Bankrupt claimed that the growing crop was exempt, and insisted that it could not pass to the trustee because he would be compelled to commit a trespass in going upon the land to gather the crop. The court, however, says:--"but in case of voluntary bankruptcy, when the bankrupt comes forward and renders all his property, not subject to execution, to be applied ratably upon his debts in order that he may reap the benefits of the Bankrupt Act, the question may well be asked, does he not by his action extend an invitation and give warrant to the trustee to come upon the homestead and gather what belongs to his creditors."

The court ordered the bankrupt to deliver the product of the crop to the trustee.

We submit we can see no escape for the bankrupt in this case and therefore, confidently submit the matter to the court for decision.

Jno. M. Flayberg
Attorney for Petitioner.

No. 2628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of R. S. MILLER,
A Bankrupt.

OLMSTED-STEVENSON COMPANY
(a corporation),
Petitioner,

VS.

R. S. MILLER,
Respondent.

PETITION FOR A REHEARING.

OLMSTED-STEVENSON COMPANY,
Petitioner.

JOHN B. CLAYBERG,
Pacific Building, San Francisco,
Its Attorney.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

No. 2628

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of R. S. MILLER,

A Bankrupt.

OLMSTED-STEVENSON COMPANY

(a corporation),

Petitioner,

VS.

R. S. MILLER,

Respondent.

PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Olmsted-Stevenson Company, the petitioner in the above entitled action, and files this its petition for a rehearing and re-argument of the petition for revision and review of the decision of the District Court of the United States in and for the District of Montana, and for the reversal of the judgment of this court upon said petition for revi-

sion and review, made and entered by this court on the 6th day of March, 1916, upon the following grounds for the following reasons:

I.

That the prevailing opinion, filed March 6, 1916, upon which said judgment has been entered, seems to be based upon the proposition that the federal cases cited and relied upon by this petitioner at the hearing of said petition for said revision and review, were and are contrary to and in conflict with the decisions of the several Supreme Courts, of the several States which were within the districts in which said federal cases arose and were decided. That no opportunity has been given counsel for this petitioner to argue such questions before this court or to be heard thereon; that such questions were not raised or argued either in the briefs filed in this court by respondent or in the argument of counsel for respondent upon the hearing by this court upon said petition for revisal and review.

II.

That the Honorable Judges of this court on or about the 7th day of February, 1916, filed opinions herein, and by virtue of the prevailing opinion thus filed, the order and judgment of the District Court of the United States in and for the District of Montana, sought to be revised and reviewed by said petition, was reversed, and a judgment entered by

this court in favor of this petitioner reversing the same; that on or about the 11th day of February, 1916, this court made and entered its following order:

“ORDER VACATING JUDGMENT OF THIS COURT, ETC.

Good cause therefor appearing, it is ordered that the judgment of this court that was filed and entered, and the opinion and dissenting opinion that were filed in the above entitled matter on the 7th day of February, A. D. 1916 be, and hereby are vacated and set aside and that said opinion and dissenting opinion be withdrawn by the court from the files herein, and that the petition for revision herein shall stand submitted to the court for consideration and decision as if said judgment, opinion and dissenting opinion had not been rendered.”

That thereafter and on or about the 6th day of March, 1916, the Honorable Judges of this court, filed opinions herein, and by virtue of the prevailing opinion thus filed, the judgment and decision of the District Court of the United States in and for the District of Montana was affirmed, and judgment ordered to be entered affirming the same; that it is apparent from the foregoing that two judges of this court, who heard the arguments upon said petition for revision and review, first agreed and decided that the judgment of the District Court of the United States in and for the District of Montana, sought to be revised and reviewed, should be reversed, and filed an opinion to that effect, and that thereafter one of the judges so deciding, felt obliged to and did change his opinion and agreed to the affirmance of the judgment and order of the

District Court of the United States in and for the District of Montana.

While we do not desire to be understood as questioning the power of this court to take the proceedings recited above, but we respectfully submit that petitioner should have been permitted to argue all questions upon which any member of this court felt obliged to change his opinion, before such member announced such contrary opinion. We submit that in all fairness when this court ordered a re-submission, such re-submission should have been upon a re-argument by respective counsel, at which such counsel could have had an opportunity of presenting their views.

Dated, San Francisco,

April 12, 1916.

OLMSTED-STEVENSON COMPANY,
Petitioner.

JOHN B. CLAYBERG,
Its Attorney.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

JOHN B. CLAYBERG,
Counsel for Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES R. RYAN, PETER BAZINET and WILLIAM
MILLER, Petitioning Creditors,

Appellants,

vs.

HERMAN MURPHY,

Appellee

In the Matter of HERMAN MURPHY, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

AUG 20 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES R. RYAN, PETER BAZINET and WILLIAM
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names of Attorneys.

DANIEL O'CONNELL, Esq., Attorney for Petitioning Creditors.

Messrs. MASTICK & PARTRIDGE, Attorneys for Alleged Bankrupt.

UNITED STATES OF AMERICA,

District Court of the United States, Northern District of California.

Clerk's Office.

No. 8196.

In the Matter of HERMAN MURPHY,

Involuntary Bankrupt.

Praeceptum [for Transcript of Record on Appeal to U. S. Circuit Court of Appeals].

To the Clerk of said Court.

Sir: Please issue in the form in accordance with equity rules 75 and 76 of the Supreme Court of the United States and the annexed statement of the record in this proceeding to be incorporated into the Transcript on Appeal to the U. S. Circuit Court of Appeals, and which comprises all the material allegations and parts of the testimony of the witnesses stated in narrative form and excludes the formal and immaterial parts of all exhibits, documents, records, files and other papers used in said case and not essential to the questions presented by the Appeal, being a simple and condensed statement of the material portions of the following:

1. Creditors' petition.

2. Demurrer to that petition.
3. Order overruling the demurrer.
4. Answer of Herman Murphy to the petition.
5. Order referring to Referee in Bankruptcy.
6. The report of the Referee in Bankruptcy in full.
7. The exceptions to that report in full. [1*]
8. The opinion and decisions of the U. S. District Judge on that report and those exceptions in full.
9. Appeal to U. S. Circuit Court of Appeals in full.
10. Asssignment of errors in full.
11. Portions of testimony of James A Johnston and his exhibits admitted in evidence before Hon. M. T. Dooling, U. S. District Judge, on hearing exceptions to report of the referee.
12. Portions of testimony of William Miller, R. V. Whiting, G. A. Lavender, J. P. Williams, Herman Murphy, Ella M. Murphy, C. E. King, Daniel O'Connell, H. V. D. Johns, A. B. Catheart, L. A. Myers, and substance of the exhibits admitted in evidence in this cause before the Referee in Bankruptcy, and said U. S. District Court.
13. Portions of exhibit being transcript of testimony of Herman Murphy and Ella M. Murphy on proceedings supplementary to execution in the Superior Court in and for the County of Alameda, September 23, 1910.

Yours truly,

DANIEL O'CONNELL,

Solicitor for Petitioning Creditors Appellants.

*Page-number appearing at foot of page of original certified Record.

[Endorsed]: Filed Apr. 30, 1915, at 3 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

Appellant's Statement for Transcript on Appeal.

[Style of Court, Title and Number of Cause.]

Before ARMAND B. KREFT, Referee in Bankruptcy.

Report of Referee in Opposition to Adjudication.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California:

The undersigned, referee in bankruptcy, to whom was referred the issues joined by the answer of Herman Murphy to the creditors' petition herein, to ascertain and report the facts and his conclusions thereon, respectfully certifies and reports:

That upon the hearing of said matter Daniel O'Connell, Esq., appeared on behalf of the petitioning creditors, and H. F. Chadbourne, Esq., representing Messrs. Mastick & Partridge, attorneys for the alleged bankrupt, appeared on behalf of the alleged bankrupt. The hearing of said matter having been concluded, the same was submitted on briefs.

The petitioning creditors are James R. Ryan and Peter Bazinet, holding a joint claim in the sum of \$644.56, M. M. Carrigan, holding a claim for \$115.25, and William Miller, holding a claim for \$3,909.76. All of said claimants have recovered judgment against Murphy upon their said claims. It is not necessary to review the nature of these claims, as the

amounts proven herein exceed the jurisdictional requirement. [3]

It appears that on September 1st, 1905, William Miller loaned to Herman Murphy, \$1,000; on March 8th, 1906, \$1250; and on March 28th, 1906, \$300. On December 6th, 1910, Miller recovered a judgment in the Superior Court of San Francisco against Murphy in the sum of \$3,377.77. Prior to July 19th, 1906, Herman Murphy was the owner of certain real property in Alameda County, described in the petition herein. It is claimed by Murphy, and he so testified upon the hearing, that on July 19th, 1906, he conveyed said real estate to Ella M. Murphy, his wife, but the deed was not recorded until June 22d, 1908. This property was thereafter conveyed by his wife to the Progressive Investment Corporation, and a deed from her to said corporation was recorded in Alameda County on July 5th, 1910. Said corporation was organized on April 10th, 1910, and on November 30th, 1910, its charter was forfeited under the state law, for nonpayment of license tax. It is claimed by Miller that the transfer of said real property by Murphy to his wife was in fraud of his creditors, and void as to them.

A suit was commenced by him on March 28th, 1912, against said Murphy, Ella M. Murphy, the Progressive Investment Corporation and others (a copy of the pleadings, findings and judgment in which action is contained in Respondent's Exhibit No. 2), to set aside various conveyances made by Herman Murphy to his wife, and conveyances made by her to the Progressive Investment Corporation. This suit

was tried before the Honorable Everett J. Brown, Judge of the Superior Court of Alameda County, and findings were made by said court on April 3d, 1913, whereby it was found that the allegations of the complaint of said William Miller contained in paragraph 14 of his complaint, alleging that the conveyances sought to be set aside were made by said Murphy to his wife, and by her to the Progressive Investment Corporation with intent to defraud him, William Miller, were not true; and judgment was entered on the same day, that said William Miller take nothing by said action.

On March 24th, 1913, said Miller caused a sale to be made by [4] the sheriff of the County of Alameda, of all the right, title and interest of Herman Murphy in the real property described in the petition herein under an execution issued on the judgment obtained by him December 6th. 1910, and at which sale said Miller was the purchaser, the property so sold being one of the pieces of property which had been conveyed by Murphy to his wife, and which conveyance said Miller had sought to set aside in the suit in which judgment was entered on April 3d, 1913, against the contentions of said Miller.

On July 21st, 1913, the petition in bankruptcy herein was filed, in which petition it was charged that said Murphy committed an act of bankruptcy on March 24th, 1913, in that he suffered and permitted, while insolvent, the said Miller to obtain a preference by reason of said sale, and not having within at least five days before the sale or final disposition of said property, vacated or discharged his prefer-

ence. From all of which it appears that said Miller charges as an act of bankruptcy, an alleged preference received by himself.

The deed from Murphy to his wife was recorded June 22d, 1908. If such deed was made with intent to defraud creditors, an act of bankruptcy was committed under Sec. 3-a (1), which must be taken advantage of by the creditors within four months after the deed was recorded. In this case William Miller having permitted such four months to expire, now seeks by means of such execution sale to create an act of bankruptcy under Sec. 3-2 (1).

The petition further recites certain facts concerning the conveyance of certain real property by said Murphy to his wife in 1906, and the subsequent conveyance to the Progressive Investment Corporation, which facts are the same facts charged in the action aforesaid of Miller against Murphy and others in the Superior Court to set aside conveyance. In view of the fact that the claims of William Miller were at the time of said sale on execution in the course of trial in the State Court, I can conceive of no reason for the proceeding taken by Miller in causing such sale to be made, [5] other than it was intended thereby to lay a foundation of a charge of preference upon which a bankruptcy proceeding might be brought, with the object in view of transferring from said court to this Court the issues in the suit then pending.

From the above state of facts the question is presented whether this Court shall entertain this petition. I am satisfied that the other petitioning credi-

tors have been caused to join in this proceeding at the instance of William Miller.

At the outset of this hearing, when it became known to the referee that the property which is the subject of the alleged preference was adversely claimed, the referee stated to the parties that in his opinion this Court should not proceed to try the issues relating to such adverse claim, but that it might proceed with the inquiry as to whether the alleged bankrupt was insolvent at the time the alleged preference was acquired, and that if insolvency at that time was proven, the making of the adjudication of bankruptcy should be suspended until the question of title had been determined in the proceeding which the transferee and present claimant of said property is a party. Counsel for petitioners, however, desired to present his case as to the alleged fraudulent character of the transfers, and invoked the rule of *in re Barnette*, No. 5611, in this Court, namely, that the Referee should not exclude evidence offered, although he may decide it incompetent, irrelevant or immaterial; and he was permitted to do so, the Referee not anticipating the length to which such hearing would be prolonged. The testimony taken comprises 459 pages, practically all of which is directed to the question of the invalidity of the transfers made by Herman Murphy to his wife, and by her to the Progressive Investment Corporation.

I am making no finding upon such issues, for the following reasons: First, That the determination of such issues in petitioner's favor would not establish the ultimate fact to be proven, namely, that William

Miller will receive a preference by virtue of his purchase at the execution sale, such determination not being [6] binding on the transferees who claim the property. Second. That the State Court having first acquired jurisdiction over the issues concerning the title to said property, it should, in my opinion, retain the same. The judgment of said court is, in part, in the following language:

“That the directors or trustees of the defendant Progressive Investment Corporation in office at the date of the forfeiture of the charter thereof, to wit, on the 30th day of November, 1912, as trustee for the creditors and stockholders of said Progressive Investment Corporation are the owners of all the described property,” describing the property mentioned in the petition herein; and this judgment is *res adjudicata* as to the claims of William Miller unless reversed on the appeal now pending, taken from such judgment by William Miller, being between the same parties and on the same issues.

It is contended by counsel for petitioning creditors that this Court can always decide questions of title when necessary to the granting of relief. Cases are referred to where bankruptcy courts have considered questions of fraudulent transfers although the transferees were not parties to the proceeding.

Under the first and second acts of bankruptcy as defined in Section 3 of the Act, namely, transfers with the intent to hinder, delay and defraud creditors, and preferential transfers, the Court will try the question as to whether the transfers were made with

intent to defraud or prefer without the transferee being a party, although its judgment is not binding upon him. But under said acts of bankruptcy the intent of the bankrupt to defraud or prefer, is the essential element. The question as to whether the property can be recovered from the transferee is immaterial. Under Sec. 3-a (3), being the provision covering the act of bankruptcy charged herein, it must be proven that the property of the bankrupt will be obtained by the creditor through legal proceedings. And where the property is adversely claimed, the fact that value will be received by the creditor cannot be established until the question of title has been determined in a proceeding binding upon the adverse claimant. Otherwise a person may be adjudged a bankrupt for failing to [7] release a levy on property which he did not own. It may be that this Court has power to bring such adverse claimant before the Court so that it may determine the rights of all parties. But in the case at bar the State Court having first acquired jurisdiction in a suit brought by one of the petitioning creditors herein, presenting the same issues, such court should be permitted to proceed to a final determination thereof, even if this Court could stay such proceedings and bring all the parties before it.

Counsel for petitioners further contend that such adverse claim can only be made by Mrs. Murphy or the Progressive Investment Corporation, and that neither of said parties has intervened to assert such claim in this proceeding.

Certainly the alleged bankrupt charged with suf-

fering a creditor to obtain a preference through legal proceedings by an execution, upon property which it is claimed belongs to the bankrupt, can disclaim ownership of the property and show that it is held by another, adversely to the claim of the creditors. It may be that this Court will inquire into the adverse claim sufficiently to ascertain whether the same is merely colorable. The bankrupt in this case has shown that it has been decreed by the State Court that the property is not his property, which is conclusive proof that a *bona fide* adverse claim exists.

As to the insolvency of Herman Murphy at the date of the alleged commission of the act of bankruptcy charged and at the date of the filing of the petition herein, the evidence shows that Murphy at said times owned no property of any ascertainable value, and I find that at such times he was insolvent.

My conclusion is that the petition herein either should be dismissed, or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the State Court can be determined.

Respectfully submitted:

San Francisco, July 3, 1914.

A. B. KREFT,

Referee in Bankruptcy. [8]

The expense of this proceeding has been as follows:

Paid reporter by petitioning creditors.....	\$396.20
“ “ “ respondent	37.50
<hr/>	
Total.....	\$433.70

Papers transmitted herewith:
Transcript of testimony, 2 vols.
Order setting hearing.
Notice to Herman Murphy et al. to produce books,
etc.
Seven summonses to witnesses.
Opening brief of petitioners.
Reply brief of bankrupt.
Closing brief of petitioners.
Petitioners' Exhibits A to Z and AA to II.
Respondents' Exhibit 1, 2 and 3. [9]

[Style of Court, Title and Number of Cause.]

Exceptions to Referee's Report.

Now come the petitioning creditors and within the time extended by said United States District Court herewith present and file their exceptions to the Referees' Report in the above-entitled proceeding as follows:

FIRST EXCEPTION.

The order referring the petition of said creditors and the answer thereto is as follows:

"On motion of Daniel O'Connell, Esquire, by the Court ordered that this matter be and the same hereby is referred to A. B. Kreft, Referee in Bankruptcy, to ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein."

Among "the issues joined by the answer to the creditors' petition herein" were as follows:

1. At the date of filing the petition was Herman

Murphy indebted to James R. Ryan and Peter Bazinet in the sum of \$644.50 or any other sum?

2. At the date of filing the petition was the judgment in favor of M. M. Corrigan against Herman Murphy in full force and effect?

3. Was the respondent Herman Murphy the owner of any part of the real estate described in the creditors' petition at any time since July 19, 1906?
[10]

4. Was the respondent Herman Murphy the owner of any part of the real estate described in the creditors' petition when said property was attached July 1, 1908, and July 20, 1908, in the action of William Miller against Herman Murphy?

5. Was the respondent Herman Murphy the owner of any part of the real estate described in the creditors' petition at the time of the commencement of the suit against Herman Murphy and others to foreclose the mortgage of Berkeley Bank of Savings and Trust Company on the property?

6. Was the respondent Herman Murphy the owner of any part of the real estate described in the creditors' petition at the time of the commencement of the said suit against Herman Murphy to foreclose the mortgage of Berkeley Bank of Savings and Trust Company on the property?

7. Was Herman Murphy insolvent on the 24th day of March, 1913, when said real estate was sold on execution against him?

8. Was Herman Murphy at the time of the sale of said property at execution on March 24, 1914, the owner of any right, title, estate or interest in the

same real property described in the creditors' petition?

9. At the time of said sale was said real estate or any part of it the property of said Herman Murphy, respondent?

10. Did Herman Murphy, while insolvent, on July 19, 1906, or at any time, make, sign and deliver to his wife, E. M. Murphy, a deed of gift of said real property?

11. Did Herman Murphy while heavily indebted and in contemplation of insolvency make, execute and deliver and record a gift deed of said property to his wife, Ella M. Murphy, in July 19, 1906?

12. Did Herman Murphy execute July 19, 1906, and record a gift deed of said property to his wife, Ella M. Murphy, with the intent or for the purpose of hindering or delaying or cheating or defrauding any of the past or any of the present or any of [11] the future creditors of said Herman Murphy?

13. Was the said deed made or recorded with the intent, or for the purpose of hindering or delaying, or defrauding William Miller, or James R. Ryan, or Peter Bazinet?

14. Did the said Ella M. Murphy have knowledge or notice of said intent or purpose?

15. Did the said Ella M. Murphy participate in said intent or purpose?

16. Was there any change in the possession or control of said property after the said making or recording of said deed?

17. Was there any consideration whatever at any time paid for said deed so recorded?

18. Was the organization of the corporation Progressive Investment Corporation a mere contrivance and sham for the purpose of putting the record title to said property in the name of said corporation and beyond the reach of the creditors of Herman Murphy, or for the purpose of hindering, or delaying or hindering or defrauding the creditors of Herman Murphy?

19. Was the conveyance of said real estate by said Ella M. Murphy and recorded July 5, 1910, made or executed or recorded with the intent or for the purpose of hindering or delaying or defrauding any of the creditors of Herman Murphy?

20. Did the said conveyance so recorded July 5, 1910, hinder or delay or defraud any of the creditors of said Herman Murphy?

21. Was there any consideration whatever paid for said conveyance?

22. Did the said Progressive Investment Company or its incorporators and directors Ella M. Murphy, Helen B. Murphy and C. E. King have any notice or knowledge of any writs of attachment being recorded against said property July 1, 1908, or on July 20, 1908, or on February 10, 1909, or of any said attachments [12] before the making or recording of said deed which was recorded July 5, 1910?

23. Did the said corporation and its officers and directors know before or at the time of the making or of the recording of said conveyances that Herman Murphy was insolvent?

24. Was Herman Murphy insolvent June 22, 1908?

25. Was Herman Murphy insolvent July 19, 1906?

26. Has Herman Murphy been insolvent since June 22, 1908?

27. Did the recording June 22, 1908, of the deed dated July 19, 1906, hinder or delay the creditors of Herman Murphy from collecting the debts due them from Herman Murphy?

None of the facts arising on these twenty-seven issues, except the first are contained in said report, and no report whatever is made on the other twenty-six issues, or of any of the facts arising therefrom.

SECOND EXCEPTION.

The findings and report of the referee are worthless, in that, he had no jurisdiction to make the findings and report that he does make, because they are not of facts relating to, or arising from, the issues raised by the answer to the creditors petition, which were the only issues referred to him, and he had no jurisdiction, power or authority whatever except that which was contained in the order of reference aforesaid.

THIRD EXCEPTION.

The referee knew the issues referred to him, and deliberately and wilfully refused to find and report any of the facts relating to said issues as plainly appears from said report wherein said Referee says:
[13]

“It is claimed by William Miller that the transfer of said real property by Murphy to his wife was

in fraud of his creditors and void as to them.” (Page 2.) This was admittedly the main and decisive issue in the case. Again, on page 4 of that report he says:

“The testimony taken comprises 459 pages, practically all of which is directed to the question of the invalidity of the transfers made by Herman Murphy to his wife, and by her to the Progressive Investment Corporation.” Also on page 7 of said report he says:

“The cost of this proceeding has been as follows:	
Paid reporter by petitioning creditors....	\$396.20
Paid reporter by respondent	37.50
	<hr/>
	\$433.70”

“I am making no finding upon such issues, for the following reasons: first, that the determination of such issues in petitioner’s favor would not establish the ultimate fact to be proven, namely, that William Miller will receive a preference by virtue of his purchase at the execution sale, such determination not being binding on the transferees who claim the property: second, that the state court having first acquired jurisdiction over the issues concerning the title to said property, it should, in my opinion, retain the same.”

Neither of those two “reasons” or questions he refers to, were referred to him, and he had no jurisdiction or authority to determine, or consider, or even hear them; his reasons were not called for, and they have no bearing whatever on the issues involved.

The petitioning creditors orally and in their briefs specifically called the attention of the Referee to their evidence showing plainly the said fraud and specifically requested the Referee to report the facts bearing upon that question, and the Referee [14] promised to do so, that question of fraud was specifically argued by respondent but an examination of his report shows that he failed to do so and reported irrelevant and immaterial facts which were not based on any evidence in the record, or were admitted in the pleadings or by the parties.

FOURTH EXCEPTION.

The Referee usurped the jurisdiction of the United States Circuit Court of Appeals in the following particulars:

1. It was a part of the record before him and brought to his attention that the United States District Court had overruled respondents' demurrer and decided that the petition should not be dismissed from which decision no appeal was taken and it had become final judgment, yet in the fact of this record and the judgment of the United States District Court he says on page 4 of his report:

"From the above state of facts the question is presented whether this Court shall entertain this petition."

Whereas the only questions before the Court were presented by the pleadings on which that question was settled before the case was referred to him and had become the law of the case binding on the world, and beyond the jurisdiction of the Referee to review,

it could not then be revived by the U. S. Circuit Court of Appeals.

2. The Referee did in fact usurp a jurisdiction greater than that of the United States Circuit Court of Appeals and did reverse the United States District Court when he says on page 6 of his report:

“My conclusion is that the petition herein either should be dismissed or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the State Court can be [15] determined.” This conclusion was stated not only in the face of the contrary and final judgment made by the District Court after oral argument and typewritten briefs, that is should not be dismissed, but also that the hearing should not be stayed but should proceed and that said Referee should hear the evidence and report the evidence and the facts on the issues raised by the pleadings.

3. That conclusions shows a plain disregard of the decision of the Supreme Court of the United States in the case of the U. S. F. and D. Co. vs. Bray, 225 U. S. 205, 217; 56 Law edition 105 which decides that the U. S. Bankruptcy Court must not surrender its jurisdiction and control in bankruptcy matters to any other tribunal; and other well established principles governing the exercises of complete jurisdiction by courts of equity and other courts.

FIFTH EXCEPTION.

The Referee plainly committed prejudicial error as shown by that part of his conclusion which says: “or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the es-

tate Court can be determined" and also shown on page 2 of his report showing that in direct violation of the decision in *Di Nola vs. Allison*, 143 Cal. 106, 65 L. R. A. 419, and other decisions brought to his attention admitted in evidence the record of an action pending before Judge Brown in the Superior Court in Oakland in which an appeal had been duly taken, bill of exceptions settled, a motion for new trial pending and since granted, and increased his error by basing his conclusion on that plainly incompetent evidence, after emphasizing his error in his report by repeatedly referring to that judgment which could not exist after his statement of a pending appeal. [16]

We have thus seen that of his two conclusions they were both finally disposed of by the decision and action of the District Court before anything was referred to him and again that his second conclusion was based solely on incompetent evidence and must be rejected with the evidence.

SIXTH EXCEPTION.

The said Referee invents, raises and decides many questions which are not raised by the petition and answer, and which questions were not referred to him and his decisions of such questions are without support of law or evidence and against the law and the evidence, as follows:

1. On page 4 of his report he says:

"I am satisfied that the other petitioning creditors have been caused to join in this proceeding at the instance of William Miller."

No such question was raised by the pleadings, or

was referred to the Referee, or is of the slightest materiality. It is plain that in order to have three creditors join in a petition they cannot be forced to join, and there must be a community of interest and purpose before they will join, and some one must in every case, apply to, and persuade, the other creditors to join in the petition with him.

2. Its immateriality is further shown by the fact that it is alleged on page 3 of the petition and admitted that the whole number of creditors is less than 12 and therefore only one creditor was necessary as a petitioner, Ryan and Bazinet alone were sufficient. But the petitioning creditors submit that whatever satisfied the Referee, there was *not a particle of evidence offered*, and there is not a particle of evidence in the record, directly or indirectly showing that William Miller persuaded the other creditors to join him, or that the other creditors [17] persuaded William Miller to join them.

3. Indeed there is an insinuation that this defrauded judgment creditor whose savings were loaned to the alleged bankrupt February 1, 1905, and who has been during the past nine years in every court vainly trying to collect the money justly due him, is now guilty of some wrong in applying to the bankruptcy court to assist him in collecting his money and securing justice.

SEVENTH EXCEPTION.

The Referee bases his conclusions in his report on grounds which are not good in law and equity and which were decided before any matters were referred to him, as follows:

On page 3 of his report the Referee says:

“On July 2, 1913, the petition in bankruptcy herein was filed, in which petition it was charged that said Murphy committed an act of bankruptcy on March 24, 1913, in that he suffered and permitted, while insolvent, the said Miller to obtain a preference by reason of said sale, and not having within at least five days before the sale or final disposition of said property vacated or discharged his preference. From all of which it appears that said Miller charges as an act of bankruptcy, an alleged preference received by himself.”

The immateriality of such statement and ground is as follows:

1. These facts being stated in the petition the overruling of the demurrer settled the law that they did not in any way obstruct the granting of the petition or any of the judgment creditors resorting to the court of bankruptcy to collect their judgments.

2. There is no law whatever which would prevent even William Miller or any other judgment creditor complaining to a [18] court of bankruptcy that his judgment debtor committed an act of bankruptcy by *permitted* his property to go to execution sale when any person could be a purchaser, even though that judgment creditor happened to be the purchaser, and thus force the bankrupt to deliver up all his concealed property towards the payment of his honest debts, which cannot injure, but will benefit him by so far reducing his indebtedness. If he has no other property he is not damaged. The judgment creditor can secure no

advantage, for if the purchase is a perference it is set aside by the bankruptcy proceedings which must be instituted within four months after the sale. There is certainly no wrong in a creditor bidding and buying at an execution sale open to all persons to bid and buy.

3. The petition shows that Ryan and Bazinet were creditors to the amount of \$600.00 and that there were less than 12 creditors in all and they could maintain the petition regardless of Miller, and anything that Miller did or did not do could not affect them in prosecuting the petition.

EIGHTH EXCEPTION.

There is no claim to the real estate referred to in the petition, nor was there any adverse claim to the property by any other person or corporation than Herman Murphy.

NINTH EXCEPTION.

There is no excuse whatever for the Referee not finding and reporting the material and decisive facts in the case for they plainly appeared from admissions and evidence to be as follows:

1. It was both admitted and proved that the alleged fraudulent deed of the property in question dated July 19, 1906, from [19] Herman Murphy to his wife was a gift deed made without any consideration. But the Referee does not report those facts.

2. It was admitted and proved and appears on page 2 of the Referee's Report that at the time and long prior to the date of said deed, William Miller was a creditor of Herman Murphy for money bor-

rowed by Herman Murphy \$100.00 borrowed February 1, 1905; \$1,250.00 March 8, 1906, and \$300.00 March 28, 1906, not one cent of which loans has ever been paid.

3. It was admitted, proved and unexplained, and it appears on page 2 of the Referee's Report, that the deed was not recorded until June 22, 1908, nearly two years after its date.

4. It was proved but does not appear in the Referee's Report, that this real estate was attached July 1, and July 20, 1908, in an action by William Miller against Herman Murphy to collect those three items of indebtedness. Judgment was entered in said action December 6, 1910, for the full amount claimed with interest from June 1, 1908.

5. It was proved but does not appear in the Referee's Report, that no motion for new trial was made in that action, no bill of exceptions was filed, and that Herman Murphy admitted that the money was always justly due Miller, yet in June, 1909, and about the last day allowed by law, he filed an appeal from said judgment and December 12, 1912, the Supreme Court dismissed said appeal.

6. There was no evidence whatever that said deed of July 19, 1906, was ever delivered by Herman Murphy to his wife or to any other person for her, but on the contrary it appears from the uncontradicted evidence of the said wife of Herman Murphy that said deed was never delivered to her, but that it has always been and is now in the possession of said Herman Murphy who [20] caused it to be recorded, and has had it in his possession before and

ever since it was recorded. But the Referee's Report does not mention any of these facts.

7. It appeared that prior to and on July 19, 1906, Herman Murphy was heavily indebted, and that ever since July 19, 1906, he has been insolvent.

8. On July 19, 1906, Herman Murphy owed:

William Miller (Trans. page 11) ..\$2250.00

George C. Richards (Trans. page
60)\$2000.00

\$4250.00

His property on that date and August 1, 1906, was as follows:

Balance in bank July 1, 1906.....\$717.81

“ “ “ August 1, 1906... 92.83

Interest in certain mining claims, on which no value was or could be set by Herman Murphy or any one else, and they were also exempt to a value of \$5000.00, about \$1500.00 to \$2000.00 in a safe deposit box to which himself and his wife had keys and access.

Payment of these sums had been continually demanded from him, but he was unable to pay, and no part of the said sum due to Miller has ever been paid and no part of the money due Richards was ever paid until March 25, 1913, when it was compromised by the payment of \$900.00 for a judgment of more than \$2000.00.

It plainly appeared from the evidence that the conveyances of July 19, 1906, made Herman Murphy insolvent and he has been insolvent ever since.

9. At the dates of the recording of those deeds June 22 and June 30, 1908, said Herman Murphy owed the same debts [21] of.....\$4250.00 and the following additional:

C. L. Hooper.....	\$ 200.00	
William Miller	300.00	
William Miller note of June 16,		
1908	4000.00	\$4500.00

Making in all an unsecured in-		
debtedness of		\$8750.00

There was no more property accessible to his creditors on execution except a debt of \$1000.00 was due to him as a bill receivable.

There was since October 31, 1907, a suit pending against him to collect that debt of G. L. Hooper.

Miller and the other creditors repeatedly demanded the payment of their debts but Murphy was unable to pay, and did not pay, any of them.

It plainly appears from the evidence that he was insolvent when the deeds were recorded, and had been for nearly two years before, and has been ever since.

10. It plainly appeared that but for the said conveyance of July 19, 1906, William Miller and the other then creditors could have collected their debts out of that property, and by reason of that conveyance they have been delayed and prevented collecting their debts. Also the circumstances were such

that Herman Murphy knew and intended that such would be the consequences of such conveyance and especially the recording of said conveyance.

11. It plainly appeared from the uncontradicted evidence that there was no change whatever in the possession or control of the property since said conveyance July 19, 1906, and that the conveyance was a mere sham and contrivance to hinder, delay and defraud the creditors of Herman Murphy, and that it has so [22] succeeded thus far, and therefore that the conveyance was *void* that the real estate was owned by Herman Murphy when it was sold March 24, 1913, on execution sale and the failure to prevent that sale was an act of bankruptcy as alleged in the petition.

WHEREFORE the said petitioning creditors pray this Honorable Court to reject the conclusions and recommendations of the Referee and set the earliest convenient date for hearing and considering the evidence reported by the Referee and make and enter an order and judgment granting the prayers of the petition and adjudging said Herman Murphy a bankrupt, and such other orders and decrees as the evidence and circumstances require.

DANIEL O'CONNELL,
Attorney for Petitioning Creditors. [23]

Opinion and Decision.

DANIEL O'CONNELL, Esq., Attorney for
Petitioning Creditors.

MASTICK & PARTRIDGE, Attorneys for
Herman Murphy.

The argument on the demurrer to the petition

herein was directed solely to the time of the sale averred in the petition and not to the character thereof and the only question decided in overruling the demurrer was that the petition was filed in time. No authority has been cited to the effect that the failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously, constitutes an act of bankruptcy, even though followed by averments that such transfer was a fraudulent one. Nor can it appear that such attaching creditor will obtain a preference until such sale has been determined to be fraudulent in an action to which the transferee is a party. Nor will a Court listen with much patience to a petitioning creditor who complains that he himself has received a preference under such proceedings. For these reasons the report of the Referee is affirmed, the petition for adjudication denied, and the proceedings dismissed.

M. T. DOOLING,
Judge.

December 4, 1914. [24]

[Style of Court, Title and Number of Cause.]

**Petition for Appeal in Bankruptcy (and Order
Allowing Appeal).**

Petition on appeal of James R. Ryan, Peter Bazinet and William Miller, and each of them petitioning creditors in bankruptcy of Herman Murphy, alleged involuntary bankrupt.

The above-named James R. Ryan, Peter Bazinet and William Miller, petitioning creditors in bankruptcy against Herman Murphy, alleged involuntary bankrupt, considering themselves, and each of themselves, aggrieved by the judgment and decree made and entered on the fourth day of December, A. D. 1914, in the above-entitled cause, affirming and confirming the report of the Referee, and denying the petition to adjudge said Herman Murphy a bankrupt, and dismissing said proceedings in bankruptcy, do hereby appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filled herewith, and they and each of them pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DANIEL O'CONNELL,

Attorney for Petitioning Creditors.

The foregoing claim of Appeal is allowed.

M. T. DOOLING,

United States District Judge. [25]

[Style of Court, Title and Number of Cause.]

Assignment of Errors.

Now, on this fourteenth day of December, 1914, come James R. Ryan, Peter Bazinet and William Miller and each of them, the petitioning creditors, and say the decree entered in the above cause on the

fourth day of December, A. D. 1914, is erroneous and unjust to said petitioning creditors and file the following assignment of errors:

First. Because the said District Court erred in ruling, holding and deciding that the Referee in Bankruptcy had any jurisdiction other than "to ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein," especially as the record and evidence show that the only authorization given to said Referee was in the following order: "On motion of D. O'Connell, Esq., it is by the Court ordered that this matter be and the same is hereby referred to A. B. Kreft, Referee in Bankruptcy, to ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein."

Second. Because the said District Court erred in ruling, holding and deciding that the Referee in Bankruptcy had jurisdiction to consider and determine the sufficiency of the allegations of the creditors' petition, or other questions of law other than for admission or rejection of offered evidence. [26]

Third. Because the said District Court erred in approving and affirming the report of said Referee in that said report did not, in fact, or even pretend to, "ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein"; although said report states, on page 4 thereof, that "the testimony taken comprises 459 pages, practically all of which is directed to the question of the invalidity of the trans-

fers made by Herman Murphy to his wife, and by her to the Progressive Investment Corporation” and again on page 7 of said report he says: “The cost of this proceeding has been as follows: Paid reporter by petitioning creditors, \$396.20, paid reporter by respondent, \$37.50, total, \$433.70”; and said report further says: “I am making no finding upon such issues, for the following reasons: First, that the determination of such issues in petitioners’ favor would not establish the ultimate fact to be proven, namely, that William Miller will receive a preference by virtue of his purchase at the execution sale, such determination not being binding of the transferees who claim the property. Second: They, the State Court, having first acquired jurisdiction over the issues concerning title to said property, it should in my opinion, retain the same.”

Fourth. Because said District Court erred in approving and affirming the report of said Referee in that said referee in his said report states that he deliberately fails to comply with the said order referring the matter to him and also states that he deliberately fails to ascertain and report the facts on the material and decisive issues raised by the answer to the creditors’ petition and on which issues the Referee states nearly all of the great amount of evidence was offered before him.

Fifth. Because the said District Court erred in not sending the matter back to said Referee ordering him to comply with the [27] said order referring said matter to him and “to ascertain and report the facts and his conclusions therefrom on the issues

joined by the answer to the creditors' petition herein," as originally ordered by said District Court, which order has never been revoked or modified in any manner.

Sixth. Because the said District Court erred in disregarding, and not considering as binding and conclusive upon said District Court, the decision and judgment of said District Court made August, 1913, overruling the respondent's demurrer to the said creditors' petition, which decision and judgment has never been reversed or modified and from which no appeal was ever taken, and thus conclusively established the sufficiency of the allegations of an act or acts of bankruptcy committed by respondent and to have said respondent adjudged a bankrupt regardless of any argument made before the overruling of said demurrer.

Seventh. Because the said District Court erred in approving and affirming said report as it thereby deprives the petitioning creditors of a trial and ascertainment and determination of the facts on which the rights of said petitioning creditors depend and which will enable them to properly and fully present their claims to the United States Circuit Court of Appeals, especially as evidence and proof was offered before said Referee showing that the title to the real estate involved, never passed from the bankrupt, by reason of the established fraudulent intent of the grantor, and also because the gift deed was never delivered to the grantee.

Eighth. Because the said District Court erred in not giving the petitioners a trial on the facts and

making findings of the facts on the issues raised by the answer to the petition of the creditors as the law requires said District Court to do when a [28] jury trial is not claimed and where the judgment overruling the demurrer is unappealed and has become final and conclusive as in this case, and regardless of any Referee, or any reference to any Referee.

Ninth. Because said District Court erred in ruling, holding and deciding that "the only question decided in overruling the demurrer was that the petition was filed in time," in that the record of the decision and judgment overruling the demurrer August, 1913, must govern, and is decisive of what was decided at that time and cannot be modified or changed collaterally, December 4, 1914, and said demurrer alleges as follows: "Now comes Herman Murphy, respondent above named, and demurs to the petition in involuntary bankruptcy in the above-entitled matter, and for grounds of demurrer specifies: that said petition does not state facts sufficient to constitute a cause of bankruptcy against said respondent. Wherefore, respondent prays that his demurrer be sustained with costs," and therefore the said judgment "demurrer overruled" and allowing so many days to answer decided that the petition stated "facts sufficient to constitute a cause of bankruptcy against respondent."

Tenth. Because said District Court erred in holding, ruling and deciding that "the failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously does not con-

stitute an act of bankruptcy even though it is averred that such transfer was a fraudulent one," in that a fraudulent transfer is void and the property remains that of the bankrupt the same as if no transfer had been made, no matter how many years previous the deed was recorded, and it is alleged and proven that the attachment by virtue of which the property was sold was made within [29] 30 days after the recording of the fraudulent transfer, and continued in force until the property was sold on the execution issued on the judgment in the same action in which the attachment was issued.

Eleventh. Because said District Court erred in holding, ruling and deciding that "it cannot appear that such attaching creditor will obtain a preference until such sale has been determined to be fraudulent in an action to which the transferee is a party," in that the court of bankruptcy has the power to determine any fact necessary to the exercise of its own exclusive jurisdiction; also neither the bankrupt or grantee or transferee made any objection whatever on the record to the determination of the fact, and the grantee or transferee personally testified fully before the Referee as to her claim and title and the transcript of her testimony on the same subject, September 23, 1910, before the Superior Court of the State of California, was also put in evidence before the Referee; and it also appeared from the creditors' petition and the answer and also it was admitted and proved that the alleged fraudulent deed was a voluntary gift deed from the bankrupt to his wife and therefore the intent or knowledge or guilt

or innocence of the grantee or transferee is immaterial and that it is not necessary that she should be a party, and the fraudulent intent or insolvent condition of the grantor alone was sufficient and decisive. It appeared that said grantee or transferee never conveyed the property, and it was not alleged or claimed that she ever attempted to convey it prior to the placing of the said attachment on the property. These allegations appeared in the said petition to which said demurrer was overruled.

Twelfth. Because said District Court erred in holding, ruling, and deciding that the fact that the petitioning creditor, [30] William Miller, being the purchaser at said execution sale of the real estate of the alleged bankrupt, which sale is alleged to constitute an act of bankruptcy, cannot, as one of the petitioning creditors, complain of it as a preference, in that the said District Court in overruling said demurrer, August, 1913, decided and adjudged that he could and, no appeal having been taken from said judgment on said demurrer, and it remaining in full force and effect December 4, 1914, is conclusive and binding on said District Court until reversed by some direct proceeding for that purpose. Also in that the said creditors' petition to which said demurrer was filed and the respondent's answer each directly and specifically allege that said William Miller purchased said real estate at said execution sale on March 24, 1913. Also in that said petition alleges and it is not denied in the answer and thereafter admitted, and there was no evidence to the contrary offered at the hearing that the number of creditors of said

Herman Murphy was less than twelve, and therefore under the law only one petitioning creditor was necessary and the claim of the petitioners Ryan and Bazinet was alleged, proved and reprotoed to be for more than \$600.00, and the fact that William Miller as a complaining petitioner was mere surplusage and immaterial and could not affect the rights of the other petitioners. Also no facts were proved or alleged showing any estoppel of said Miller; or that he had done any wrong; or that he did not come into court with clean hands; or that the petition of Herman Murphy was in any way changed by such purchase; or even that said Miller purchased with any intent to subsequently make it an act of bankruptcy on the part of Murphy; or to complain of it as a preference.

Thirteenth. The said District Court erred in not directly or by reference finding the facts on the issues raised by the said creditors' petition and the answer of the respondent Herman Murphy as follows: [31]

Whether or not Herman Murphy was insolvent when that voluntary gift deed was made to his wife July 19, 1906.

Whether or not Herman Murphy was insolvent when that deed was recorded June 22, 1908.

Whether or not that deed to his wife was made July 19, 1906, in contemplation of insolvency.

Whether or not that deed was recorded June 22, 1908, in contemplation of insolvency.

Whether or not that deed was made July 19, 1906, with the intent and purpose to delay and defraud

any creditor of said Herman Murphy.

Whether or not that deed was recorded June 22, 1908, with the intent and purpose of delaying and defrauding any creditor of said Herman Murphy.

Whether or not said deed was ever delivered to his wife.

Whether or not said deed was ever delivered to his wife before the recording of the said attachment.

If said deed was ever delivered to his wife, when.

Because there was before said Referee uncontradicted evidence that there never was a delivery of said deed, which evidence was the testimony of said wife given in the Superior Court of the State of California in and for the County of Alameda more than two years after the recording of said attachment, to wit: September 23, 1910, in supplementary proceedings as a judgment against said Herman Murphy, at which time she swore that she knew nothing of those deeds and therefore could not have accepted them, and there could not have been any delivery. It appeared that she also testified at said time and place that she knew absolutely nothing about her property, or business, and left all entirely in the control of her said husband since their marriage, and that she never received or requested any accounting whatever from him. She also testified before the Referee that all her books, deeds, [32] papers of every kind, were always, since her marriage, in the possession and control of her husband since their marriage, and she did not know what they were or where they were, or anything about them, except that she knew as he had them they must be

safe, showing that said Herman Murphy never parted with the custody, control and dominion of said deed. She also testified that said Progressive Investment Corporation never received or accepted any deed of said property and never had a meeting of its board of directors, and that prior to her testimony for her own private reasons she had destroyed all the books and papers of every kind of said corporation and also all her own books and papers that she had in her possession or control. It was admitted and also proved that the said judgment of said William Miller was recovered on promissory notes given February 1, 1905, and March, 1906, and which became due before July 19, 1906, and no part of the principal of which notes has ever been paid. There was other evidence that said Herman Murphy was heavily indebted on July 19, 1906, and many of those other debts then due have never been paid. It was admitted and also proved that the real estate has been continually under various attachments placed on it July 1, and July 20, 1908, and February 5, 1909, and a judgment lien for more than \$2,000.00 since September, 1909.

There was evidence that Herman Murphy was insolvent July 19, 1906, and on that date pretended to convey all his property to his wife, and has continued insolvent ever since.

There was evidence that July 19, 1906, and ever since he had such insolvent condition in contemplation when he made, and also when he recorded that deed. There was evidence that the said deed was made with the intent and purpose on the part of said

[33] Herman Murphy to delay and defraud his creditors, and that he had succeeded in delaying and defrauding his creditors ever since.

Fourteenth. The said District Court erred in failing and refusing to consider the evidence on the said issues referred to in the thirteenth assignment of error.

Fifteenth. The said District Court erred in not finding and reporting whether or not Herman Murphy had any right, title, estate, or interest, legal or equitable, in trust, or otherwise, in said real estate on March 24, 1913, when the same was sold on execution and the permitting of which sale is alleged as an act of bankruptcy because regardless of the validity of the deed dated July 19, 1906, the bankrupt might have, since that date, and before the sheriff's sale, acquired an equitable or other interest in said real estate or it might have been held on secret trust for him and his interest, whatever they were passed at the sheriff's sale and an act of bankruptcy was thereby committed.

Sixteenth. The said District Court erred in approving and affirming the report of the said referee wherein the said referee refuses to find the facts on the issues raised on the petition and answer and after making a statement of a few immaterial and irrelevant facts proceeds as follows:

“From the above state of facts the question is presented whether this Court shall entertain this petition.”

Whereas no such question was presented, no such question was open, as the District Court decided the

question August, 1913, more than eleven months before and not appeal was taken from that judgment, and the matter became *res judicata* and final and conclusive on said court, and all parties, and said District Court could not and did not send, or present any such question to said Referee, and the question was not then presented to said Referee [34] *and the question was not then presented to said Referee or said District Court.*

Seventeenth. The said District Court erred in approving and affirming the report of said Referee wherein the said referee states as follows: "My conclusion is that the petition herein either should be dismissed or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the State Court can be determined." In that said Referee had no jurisdiction to make any such conclusion and the District Court could not and did not give him any authority to make any such conclusion or recommendation, or any conclusion whatever until he had *report* all the facts on the issues raised by the petition and the answer thereto.

Eighteenth. The District Court erred in approving and affirming the report of said referee in that no claim whatever was made to the real estate referred to in the petition, nor was there any adverse or other claim to said real estate presented by anyone other than said Herman Murphy.

Nineteenth. The said District Court erred in affirming said report of the Referee and denying said petition for adjudication and dismissing the proceedings because of each and all of the reasons

and errors hereinbefore set forth in the previous eighteen assignments of errors.

Dated San Francisco, Cal., Dec. 14, 1914.

Respectfully submitted,
DANIEL O'CONNELL,
Attorney for Petitioning Creditors. [35]

[Style of Court, Title and Number of cause.]

Record on Appeal.

I.

This was a petition in involuntary bankruptcy filed in the United States District Court for the Northern District of California, July 21, 1913, by James R. Ryan and Peter Bazinet of Madera County, State of California, and M. M. Corrigan and William Miller, both of the City and County of San Francisco, State of California, as three (3) judgment creditors of Herman Murphy of Berkeley, in the County of Alameda, State of California, who, it is alleged, was not a wage earner, or engaged chiefly in farming, or the tilage of soil, but is a person subject to be adjudged a bankrupt upon a creditors' petition, and contained the allegations as to residence of more than six (6) months, and that he owes debts to the amount of Four Thousand (\$4,000.00) Dollars and more.

The judgment of James R. Ryan and Peter Bazinet was recovered June 2, 1910, in the Superior Court of the State of California, in and for the County of Madera, on which a balance of \$540.52, with interest from June 24, 1910, at the rate of 7%

per annum, making in all \$644.56 due and unpaid at the time of filing the petition.

M. M. Corrigan alleged a judgment recovered May 14, 1913, in the Justices' Court of the City of Berkeley, County of Alameda, State of California, for the sum of \$100.00 and \$15.25 costs, all of which remained unpaid at the time of filing the petition.

[36]

William Miller alleged that he recovered a judgment against Herman Murphy in the Superior Court of the State of California, in and for the City and County of San Francisco, on December 6, 1910, for the sum of \$3,377.77 and \$1.00 was paid for execution, together with fees of the sheriff and his expenses; and that no part of the judgment was paid, and that the sum of \$3,909.76 was unpaid and owing at the time of filing the petition.

It is further alleged: "That according to their information and belief, and on their information and belief, that the whole number of creditors of the said Herman Murphy are less than twelve."

It further represented that "Herman Murphy was insolvent, and that within four months next preceding the date of filing the petition he committed an act of bankruptcy in that he did, heretofore, to wit, on the 24th day of March, A. D. 1913, suffer, and permit, while insolvent, a creditor to obtain a preference, through legal proceedings, and not having at least five days before a sale or final disposition of his property affected by such preference, vacated or discharged such preference, in that on said March 24, 1913, all the right, title, estate and interest which the

said Herman Murphy had in the real estate situated in Berkeley, in said county of Alameda, and State of California, bounded and described as follows": (and a description of the property follows):

Said petition further alleges as follows:

"Said real estate was duly attached on a writ of attachment issued in said action July 20, 1908, and again on the writ of execution issued on the judgment entered December 6, 1910, issued in the action of William Miller against Herman Murphy, and said sale was duly made on said execution by the sheriff of [37] said County of Alameda, on said March 24, 1913, to said William Miller, and said William Miller then and there received a certificate of said sale, which has been duly recorded in the office of the County Recorder of Alameda County."

The petition further alleges as follows:

"Said Herman Murphy, while insolvent, and very heavily indebted, on July 16, 1908, and prior thereto, and ever since, executed and afterwards, on June 22, 1908, caused to be recorded in the office of the County Recorder of the County of Alameda, a gift deed and deed of gift of the above-described real estate, conveying said property, or pretending to convey said property, from said Herman Murphy to his wife, said Ella M. Murphy, and said deed was so executed and recorded in contemplation of said insolvency, with the intent and for the purpose of hindering, delaying, cheating and defrauding the creditors of the said Herman Murphy, both the past, the present and future creditors of said Herman Murphy, and your petitioners, James R. Ryan and Peter Bazinet, and

William Miller were then creditors of said Herman Murphy and said Ella M. Murphy then and thereafter had notice and knowledge of the said intent and purpose, of said Herman Murphy, and participated in said intent and purpose, and in carrying it out, and there never was then or at any time thereafter any change in the possession or control of said property, and no consideration whatever was at any time paid for said pretended conveyance so recorded, and said conveyance was and is absolutely void and conveyed nothing to said Ella M. Murphy, and during all the times mentioned herein said Herman Murphy remained and continued to be, and is now, the real owner of said real estate, both at law and in equity.”

[38]

Said petition further alleged that on July 5, 1910, there was recorded in the office of the County Recorder of Alameda County, a purported and pretended deed of said real estate from said Ella M. Murphy to Progressive Investment Corporation, incorporators of which corporation were said Ella M. Murphy, Helen B. Murphy, her daughter, and C. E. King, a stenographer in the employ of said Herman Murphy, who were the only directors and trustees of said corporation; and on November 30, 1910, said corporation ceased to exist by authority of proclamation of the Governor and Secretary of State of California for nonpayment of corporation assessments and taxes; and alleged that no stock was ever issued and no certificates of stock ever issued by said corporation, and that no attempt had ever been made to wind up the affairs of the corporation, and the cor-

poration was a mere pretense and sham for the purpose of putting the record title of said property beyond the reach of the creditors of said Herman Murphy, and for the purpose of hindering, delaying, cheating and defrauding said creditors past, present and future, of said Herman Murphy, and that they were so hindered, delayed, obstructed, cheated and defrauded by the said conveyances; that the said attachments of the property on July 1, and July 20, 1908, and February 10, 1910, were all duly recorded in the office of the County Recorder, and that said King and Helen B. Murphy, Ella M. Murphy, Herman Murphy, and Progressive Investment Corporation had notice and knowledge of said attachments from the said dates that they were recorded, and that they also knew that said Herman Murphy was insolvent during all the time of the existence of the corporation; and also that they knew he was insolvent on June 22, 1908, and that he continued insolvent down to the filing of the petition. [39]

It alleged that the conveyance of the corporation recorder July 5, 1910, and the other conveyance of the property from Herman Murphy were void, and that the property of Herman Murphy continued subject to said execution sale, and prayed that said Herman Murphy be adjudged an involuntary bankrupt within the purview of said acts of bankruptcy.

The petition was signed and was duly verified.

II.

Subpoena was duly issued and Herman Murphy duly appeared by his attorneys and filed his demurrer in the following language:

“Now comes Herman Murphy, respondent above named, and demurs to the petition in involuntary bankruptcy in the above-entitled matter, and for grounds of demurrer specifies:

That said petition does not state facts sufficient to constitute a cause of bankruptcy against said respondent.

WHEREFORE, respondent prays that his demurrer be sustained, with costs.”

The United States District Court heard the demurrer and ordered it overruled, and the defendant to file his answer within five (5) days.

Thereafter defendant filed his answer in the case, in which answer there was no denial of the allegation that the number of his creditors was less than twelve.

The answer admitted the judgments recovered by Ryan and Bazinet, and also by M. M. Corrigan, but alleged that there was an appeal taken from Corrigan's judgment, and that it was pending and undetermined in the Superior Court of the County of Alameda.

It also admitted the recovery of the judgment by William Miller as alleged and the issuing of an execution thereon, and that said execution was delivered to the sheriff of the County of Alameda, State of California, and that by virtue of said execution said sheriff of Alameda County did sell at the request of William Miller [40] a pretended interest of Herman Murphy, respondent herein, in and to that certain real property in the City of Berkeley, County of Alameda, State of California, described in said petition, and alleges that at the sale of said property

on said execution said William Miller purchased the pretended interest of said Herman Murphy in said property for the sum of \$150.00, and alleged that said \$150.00 reduced the amount of judgment that sum; and alleged that he was not the owner of the property, or any part thereof, at the time of execution sale, and denied that within 4 months prior to the filing of the petition he committed any act of bankruptcy; and denied that on the 24th day of March, A. D. 1913, or at any time, he suffered or permitted, while insolvent, a creditor to obtain a preference through legal proceedings, or at all; and alleged that at the time of said sheriff's sale on March 24, 1913, and for long time prior thereto, said Herman Murphy was not the owner of all right, or title, or estate and interest in the real property described; and alleged that at the time of the sale said property was not the property, or was any part thereof the property, of the said Herman Murphy; and denied that he exercised any acts of ownership over the property, or any part of the property.

The answer further denied that, while insolvent, or very heavily indebted, on July 16, 1906, or at any time prior, or since, he made, executed, or delivered to Ella M. Murphy, or caused to be recorded in the office of the County Recorder of Alameda County, a deed of gift of the property, but alleged that, while solvent, and not heavily indebted, he made, executed and delivered on July 19, 1906, a gift deed of the property to his wife, Ella M. Murphy; but denied that it was executed and recorded in the contemplation of insolvency; and denied that it was executed

and recorded with the intent or for the purpose of hindering, [41] delaying, cheating, or defrauding, or of hindering, or of delaying, or of cheating, or of defrauding his creditors, whether the creditors were past, or present, or future creditors; or for hindering or of defrauding the said James R. Ryan or Peter Bazin or William Miller, or all or any of them.

It also denied that Ella M. Murphy then or thereafter had notice or knowledge of said alleged intent or purpose of said Herman Murphy; and denied that she participated in the alleged intent or purpose, or assisted in carrying it out; and denied that there was not at any time thereafter any change in the possession or control of the property; and denied that there was no consideration whatever paid for said conveyance; and denied that it was absolutely, or otherwise, void; and denied that it conveyed nothing to Ella M. Murphy; and denied that Herman Murphy remained, or continued to be, or now is, the real owner of said real property, or any part thereof; and denied that no stock was subscribed for or issued by the Progressive Investment Corporation; and denied that the incorporation was a mere contrivance or any contrivance or sham for the purpose of putting the record title of said property in the name of a corporation and beyond the reach of his creditors, or for the purpose of hindering, delaying, cheating and defrauding any of his creditors, past, present or future; and denies that any of his creditors were thereby hindered, delayed, obstructed, cheated, or defrauded by the deeds so recorded June

22, 1908, and July 5, 1910; and denies that they were recorded with the intent and purpose to hinder, delay, obstruct, or defraud any of his creditors; and denies that any of the incorporation had any notice of the writs of attachments being recorded July 1, 1908, July 20, 1908 or February 10, 1909; and denies that no consideration was paid by the Progressive Investment Corporation for said [42] conveyance; and denies that the officers of the corporation knew that Herman Murphy was insolvent; and denies that he was insolvent on June 22, 1908, when the deed was recorded; and denies that he has continued insolvent down to the filing of the petition; and denies that the conveyance to the Progressive Investment Corporation, recorded July 5, 1910, was void; and denies that the property so conveyed continued to be, or now is, the property of Herman Murphy and subject to said execution sale or any other incumbrances. Said answer alleged as follows:

“Respondent denies that at the time of the conveyance of said property described in said petition to said Ella M. Murphy, wife of respondent herein, and at the time of the recording of said deed to the said Ella M. Murphy, on the 22d day of June, 1908, respondent herein was not indebted in any sum to James R. Ryan or Peter Bazinet, and that upon both of said debts respondent herein was solvent and able to pay all debts owed by him, including the sum of money due to said William Miller, petitioner herein.”

The answer prayed that the petition be denied and dismissed.

The answer was duly verified. After the filing of the answer, the petition and answer were duly referred to the Referee in Bankruptcy with instructions "To ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein."

Thereafter hearings were had before the Referee in Bankruptcy, and documentary evidence and oral testimony were produced by the petitioning creditors to prove that Herman Murphy was indebted to them in the amounts claimed to be due them in the petition, and that he was insolvent at the date of the alleged commission of the act of bankruptcy charged and at the date of the filing of the petition herein. The Referee found and reported that the amount owing [43] to the petitioning creditors at said dates exceeds the amount necessary to maintain the petition, and that at the date of the alleged commission of the act of bankruptcy charged and at the date of the filing of the petition herein, said Herman Murphy was insolvent. No exception was taken by said Herman Murphy to the referee's findings and report.

When at the outset of the hearing before the Referee, it became known to him that the property which is the subject of the alleged preference was adversely claimed, he stated to the parties that in his opinion this Court should not proceed to try the issues relating to such adverse claim. Counsel for the petitioning creditors desiring to present his case

as to the alleged fraudulent character of the transfers of the property referred to in the petition, which transfers were made by Herman Murphy to his wife Ella M. Murphy on July 16th, 1906, and which property was transferred to Ella M. Murphy to Progressive Investment Corporation, on July 5th, 1910, under the averments of the petition that such transfers were made with intent to hinder and delay and defraud the creditors of said Herman Murphy, the petitioning creditors were permitted by the Referee to take the testimony thereon, under the rule announced in the case of *In re Bartnett*, No. 5611 in this court, namely, that the Referee should not refuse to take evidence offered although he may decide it to be incompetent, irrelevant or immaterial. The Referee refused to consider this evidence, and made no findings thereon, for the reasons, first: Because the determination of the issues supported by such testimony, even if determined in favor of the petitioning creditors, would not establish the ultimate fact to be proven, to wit, that Wm. Miller will receive a preference by virtue of his purchase at the execution sale, because such determination would not be binding on the transferees who claim the property; and second: Because a State Court having first obtained [44] jurisdiction over such issues, in an action brought by one of the petitioning creditors to have the transfer set aside as fraudulent, it should be permitted to retain the same. Counsel for the petitioning creditors have sought to have incorporated in this statement on appeal a summary of such evidence. Such summary was excluded from

this statement for the reason that such evidence was not admitted in the case by the Referee as relevant, competent or material evidence, nor was such evidence considered relevant or material by the Court upon the hearing of the exceptions taken by the petitioner to the Referee's Report, and for the further reason that recital of such evidence is not at all essential to a determination by the Court of Appeals of the question of law involved in this appeal, such question being "did the Referee and the Court err, upon ascertaining that the property in question was adversely claimed, in not determining in this proceeding, and in advance of such determination by plenary action in the suit then pending in the Superior Court of Alameda County, whether or no the attaching creditor Wm. Miller did obtain a preference by legal proceedings by virtue of the attachment and execution sale complained of?"

On behalf of Herman Murphy alleged bankrupt, the Referee admitted in evidence to show an adverse claim to the property, and the fact that such claim was already the subject of an action in the State Courts, a judgment-roll in the case of Wm. Miller one of the petitioning creditors herein against Herman Murphy, the alleged bankrupt herein, Ella M. Murphy, Progressive Investment Corporation et al., in the Superior Court of the State of California, in and for the County of Alameda. The complaint in said action was filed March 28th, 1912, and the plaintiff alleges therein that said William [45] Miller on July 1, 1908, commenced an action against Herman Murphy in the Superior Court of the State of

California, in and for the City and County of San Francisco, to recover the several sums of money due him from said Herman Murphy; that on July 20, 1908, in said action, the sheriff of the County of Alameda, duly attached certain real property in the County of Alameda, (the complaint describing the property, including the property referred to in the petition in bankruptcy herein); that William Miller recovered judgment in said action against Herman Murphy for the sum of \$3377.77, and that no part thereof has been paid; that at the time Herman Murphy incurred the indebtedness to William Miller, said Herman Murphy was the owner of said real property in the County of Alameda California, (the complaint described the property which includes the property referred to in the petition in bankruptcy herein, and against which the attachment aforesaid had been levied); the complaint then sets out the factes concerning the conveyance of said property by said Herman Murphy to his wife, Ella M. Murphy, and the conveyance of the same by her to Progressive Investment Corporation, and alleges that such conveyance were made with intent to defraud plaintiff William Miller. Said complaint sets out substantially the same facts in regard to said transfers as are alleged by the petitioners creditors herein, respecting the fraudulent character of said transfers. The plaintiff prays that said conveyances be adjudged fraudulent and void as to the plaintiff, and that said property be sold and the proceeds be applied tot he claims of the plaintiff. An answer was filed to the complaint by Herman Murphy, Ella M.

Murphy, and Progressive Investment Corporation. Answers were also filed by other defendants. The answers denied generally and specifically the allegations of the complaint. [46]

[Order Settling Statement for Transcript on Appeal.]

The case was tried before Honorable Everett J. Brown, and findings of facts therein filed and judgment entered by said court on April 3, 1913. It was ordered, adjudged and decreed in said action "that plaintiff take nothing by this action." The judgment of said court found from the facts as a conclusion of law "that the directors or trustees of the defendants' Progressive Investment Corporation, in office at the date of the forfeiture of the charter thereof, as trustees for the creditors and stockholders thereof, are the owners of all the real property hereinbefore described in finding VIII hereof situate at Berkeley, Alameda County, California, subject, however, to said mortgage described in finding XXIV hereof." The property described in finding VIII in said action includes the property described in the petition in bankruptcy herein.

An appeal from the judgment aforesaid was duly take by William Miller.

The foregoing is settled as the statement for transcript on appeal herein, this 22d day of June, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 22, 1915, at 5 o'clock and 20 min., P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [47]

**[Certificate of Clerk U. S. District Court to
Transcript of Record on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 47 pages, numbered from 1 to 47 inclusive, to contain full, true, and correct transcript of certain records and proceedings, in the matter of Herman Murphy, in Bankruptcy, No. 8,196, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praeipie" (a copy of which is embodied in this transcript) and the instructions of Daniel O'Connell, Esq., Attorney for Petitioning Creditors and Appellants herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twenty-six Dollars and Seventy Cents (\$26.70), and that the same has been paid to me by the Attorney for the Appellants herein.

Annexed hereto is the original Citation on Appeal issued herein, pages 49, 50 and 51.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 2d day of Aug., A. D. 1915.

[Seal]

W. B. MALING,

Clerk.

By T. L. Baldwin,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
5/2/15. T. L. B.] [48]

[Citation on Appeal (Original).]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit in the Northern District of
California.*

The United States of America,
Ninth Judicial Circuit,—ss.

To Herman Murphy Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit in the Northern District of the State of California, to be holden at the City of San Francisco, in said district, on the 14th day of January next, pursuant to a petition on appeal and assignment of error filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the matter of Herman Murphy, to show cause, if any there be why the judgment and decree in said cause affirming and confirming the report of the referee and denying the creditors' petition to adjudge said Herman Murphy a bankrupt and dismissing said petition and bankruptcy proceedings should not

be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. M. T. DOOLING, Judge of said District Court, this 14 day of December, in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the United States of America the one hundred and thirty-eight.

M. T. DOOLING,

United States District Judge. [49]

[Endosed]: 8196. In the United States Circuit Court of Appeals, for the Ninth Circuit in the Northern District of California. Citation on Appeal in Bankruptcy. At 3 o'clock and 30 min. P. M. Filed Dec. 14, 1914. W. B. Maling, Clerk. By C. W. Calbreath' Deputy Clerk. [50—51]

[Endorsed]: No. 2632. United States Circuit Court of Appeals for the Ninth Circuit. James R. Ryan, Peter Bazinet and William Miller, Petitioning Creditors, Appellants, vs. Herman Murphy, Appellee. In the Matter of Herman Murphy, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed August 2, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States District Court for the Northern
District of California, First Division.*

In the Matter of HERMAN MURPHY, Involuntary
Bankrupt.

**Order Extending Time [to January 21, 1915, to File
Statement of Evidence and Praecept, and Ex-
tending Time to February 1, 1915, to File Rec-
ord and Docket Case in Appellate Court].**

Upon application of Daniel O'Connell, Esquire,
solicitor for petitioning creditors and appellants, and
for good cause shown,

IT IS HEREBY ORDERED that the time within
which said petitioning creditors and appellants may
file their condensed statement of the evidence, and
praecipe on appeal in the office of the clerk of this
Court is hereby extended to and including January
21st, A. D. 1915, and it is FURTHER ORDERED,
that the time within which said petitioning creditors
and appellants may file the record on appeal and
docket the case with the Clerk of the United States
Circuit Court of Appeals for the United States Cir-
cuit Court of Appeals for the Ninth Circuit is hereby
extended to and including the 1st day of February,
A. D. 1915.

Done in open court this 11th day of January, A. D.
1915.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: No. 8196. In the United States Dis-
trict Court for the Northern District of California,

First Division. In the Matter of Herman Murphy, Involuntary Bankrupt. Order Extending Time. No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 1, 1915, to File Record thereof and to Docket Case. Filed Jan. 14, 1915. F. D. Monckton, Clerk.

In the United States District Court for the Northern District of California, First Division.

In the Matter of HERMAN MURPHY, Involuntary Bankrupt.

Order Extending Time [to February 1, 1915, to File Statement of Evidence and Praecept, and Extending Time to March 1, 1915, to File Record and Docket Case in Appellate Court.]

Upon application of Daniel O'Connell, Esquire, solicitor for petitioning creditors and appellants, and for good cause shown,

IT IS HEREBY ORDERED that the time within which said petitioning creditors and appellants may file their condensed statement of the evidence and praecipe on appeal in the office of the clerk of this Court is hereby extended to and including February 1st, A. D. 1915, and,

IT IS FURTHER ORDERED that the time within which said petitioning creditors and appellants may file the record on appeal and docket the case with the clerk of the United States Circuit Court of Appeals for the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to

and including the first day of March, A. D. 1915.

Done in open court this 19 day of January, A. D. 1915.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: In the United States District Court for the Northern District of California, First Division. In the Matter of Herman Murphy, Involuntary Bankrupt. Order Extending Time.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to March 1, 1915, to File Record thereof and to Docket Case. Filed Jan. 19, 1915. F. D. Monckton, Clerk.

In the United States District Court for the Northern District of California, First Division.

In the Matter of HERMAN MURPHY, Involuntary Bankrupt.

Order Extending Time [to March 30, 1915, to File Statement of Evidence and Praeipe, and to File Record and Docket Case in Appellate Court].

Upon application of Daniel O'Connell, Esquire, solicitor for petitioning creditors and appellants, and for good cause shown,

IT IS HEREBY ORDERED that the time within which said petitioning creditors and appellants may file their condensed statement of the evidence, and praecipe on appeal in the office of the clerk of this

court is hereby extended to and including March 30, A. D. 1915, and,

IT IS FURTHER ORDERED that the time within which said petitioning creditors and appellants may file the record on appeal and docket the case with the Clerk of the United States Circuit Court of Appeals for the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the 30th day of March, A. D. 1915.

Done in open court this 30 day of January, A. D. 1915.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: In the United States District Court for the Northern District of California, First Division. In the Matter of Herman Murphy, Involuntary Bankrupt. Order Extending Time.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 30, 1915, to File Record Thereof and to Docket Case. Filed Jan. 30, 1915. F. D. Monckton, Clerk.

*In the United States District Court for the Northern
District of California, First Division.*

In the Matter of HERMAN MURPHY, Involuntary Bankrupt.

**Order Extending Time [to May 1, 1915, to File
Statement of Evidence and Praeipce, and to
File Record and Docket Case in Appellate
Court].**

Upon application of Daniel O'Connell, Esquire, solicitor for petitioning creditors and appellants, and for good cause shown,

IT IS HEREBY ORDERED that the time within which said petitioning creditors and appellants may file their condensed statement of the evidence, and praecipe on appeal in the office of the clerk of this court is hereby extended to and including May 1, A. D. 1915, and,

IT IS FURTHER ORDERED that the time within which said petitioning creditors and appellants may file the record on appeal and docket the case with the Clerk of the United States Circuit Court of Appeals for the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the 1 day of May, A. D. 1915.

Done in open court this 29 day of March, A. D., 1915.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: In the United States District Court for the Northern District of California, Fourth Division. In the Matter of Herman Murphy, Involuntary Bankrupt. Order Extending Time.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 1, 1915, to File Record Thereof and to Docket Case. Filed Mar. 2, 1915. F. D. Monckton, Clerk.

In the United States District Court for the Northern District of California, First Division.

No. 8196.

In the Matter of HERMAN MURPHY, Involuntary Bankrupt.

Order Extending Time [to May 3, 1915, to File Statement of Evidence and Praecept, and to File Record and Docket Case in Appellate Court].

Upon application of Daniel O'Connell, Esquire, solicitor for petitioning creditors and appellants, and for good cause shown,

IT IS HEREBY ORDERED that the time within which said petitioning creditors and appellants may file their condensed statement of the evidence, and praecipe on appeal in the office of the clerk of this court is hereby extended to and including May 3, A. D. 1915, and,

IT IS FURTHER ORDERED that the time within which said petitioning creditors and appellants may file the record on appeal and docket the

case with the Clerk of the United States Circuit Court of Appeals for the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the third day of May, A. D., 1915.

Done in open court this 30 day of April, A. D., 1915.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: No. 8196. In the United States District Court for the Northern District of California. In the Matter of Herman Murphy, Involuntary Bankrupt. Order Extending Time. Daniel O'Connell, Solicitor for Petitioning Creditor, 942-944 Pacific Bldg., San Francisco, Cal. Herman Murphy, Pro se.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order. Under Rule 16 Enlarging Time to May 3, 1915, to File Record Thereof and to Docket Case. Filed Apr. 30, 1915. F. D. Monckton, Clerk.

In the United States District Court for the Northern District of California, First Division.

No. 8196.

In the Matter of HERMAN MURPHY, Involuntary Bankrupt.

Order Extending Time [to August 2, 1915, to File Record and Docket Case in Appellate Court].

Upon application of Daniel O'Connell, Esq., soli-

citor for petitinuing creditors and appellants, and it appearing that on June 22, 1915, the statement on appeal was approved and signed by the Judge of this court and that the clerk of this court will not have the copies ready for delivery to the clerk of the United States Circuit Court of Appeals before August 1, 1915, and for other good cause appearing,

IT IS FURTHER ORDERED that the time within which said petitioning creditors and appellants may file the record on appeal and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the 2d day of August, A. D., 1915.

Done in open court this 15th day of July, A. D., 1915.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to—to File Record Thereof and to Docket Case. Filed Jul. 5, 1915. F. D. Monckton, Clerk.

No. 2632. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to Aug. 2, 1915, to File Record Thereof and to Docket Case. Refiled Aug. 2, 1915. F. D. Monckton, Clerk.

11

In the United States
Circuit Court of Appeals
for the Ninth Circuit

JAMES R. RYAN, PETER BAZINET
and WILLIAM MILLER, Petitioning
Creditors,

Appellants,

vs.

HERMAN MURPHY,

Appellee.

No. 2632

In the Matter of HERMAN MURPHY,
Bankrupt.

BRIEF OF APPELLANTS

Upon Appeal from the United States District
Court for the Northern District of Cali-
fornia, First Division

DANIEL O'CONNELL,

Solicitor for Appellants.

Filed

No. 2632

*In the United States Circuit Court of Appeals
for the Ninth District*

JAMES R. RYAN, PETER BAZINET

Creditors,

Appellants,

vs.

HERMAN MURPHY,

Appellee.

In the Matter of HERMAN MURPHY,
Bankrupt.

Upon Appeal from the United States District
Court for the Northern District of Cali-
fornia, First Division

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Herman Murphy was insolvent at the date of the alleged commission of an act of bankruptcy by him, March 24, 1913, and was also insolvent at the date of the filing of this involuntary petition in bankruptcy July 21, 1913 (Trans. page 49), at which date the number of his creditors was less than twelve (Trans. page 45) but the amount of his debts was more than \$4,000.00.

The petitioners, James R. Ryan and Peter Bazinet, as Ryan and Bazinet, ever since June 2,

1910, were judgment creditors of said Herman Murphy, the amount of their unpaid judgment at the date of filing said involuntary petition being \$644.56. (Trans. pages 3, 41, 45, 49.)

William Miller, also a judgment creditor of said Herman Murphy for about \$4,000, and M. M. Corrigan, another judgment creditor, joined in said petition.

The act of bankruptcy charged was, the permitting of the sale of certain real estate of the bankrupt on March 24, 1913, at sheriff's sale on the execution issued on the said judgment in favor of said Miller and by virtue of an attachment of the said property made July 1, 1908, the date that action was commenced. (Trans. pages 41, 42, 46.)

The petition alleged that the property at the date of said sale, March 24, 1913, was owned by the bankrupt and had been owned by him continuously from long prior to July 19, 1906, and that on June 22, 1908, nine days before said attachment, said Herman Murphy caused to be recorded in the office of the County Recorder a pretended deed, pretending to convey said property to his wife, which deed purported to be dated July 19, 1906; and that on July 5, 1910, there was recorded in the office of the same County Recorder a pretended deed of the same real estate to Progressive Investment Corporation, a corporation composed only of the wife, daughter and stenographer of said Herman Murphy, as the only incorporators, officers, or directors, or trustees, Ella M. Murphy being its president, which corporation ceased to exist November 30, 1910, by proclama-

tion of the Governor of the State of California, for non-payment of taxes. It further alleged that both said deeds were only pretended deeds, for which no consideration was ever paid, that on July 19, 1906, and ever since Herman Murphy was, and has continued to be, insolvent, and said deeds were so made and recorded in contemplation and knowledge of said insolvency, and for the purpose of hindering, delaying, cheating and defrauding the past, present and future creditors of said Herman Murphy, and that on July 19, 1906, and ever since, said Ryan and Bazinet and Miller were and are creditors of said Herman Murphy, and that Ella M. Murphy, and Progressive Investment Corporation, and its incorporators and officers knew all these facts, and participated in said intent and purpose and that said deeds were void and never conveyed anything, and during all the times said Herman Murphy remained, and continued to be, and is now, the real owner of said real estate, both at law and in equity. (Trans. pages 41, 42, 43, 44.)

2. To this petition Herman Murphy demurred on the ground "that said petition does not state facts sufficient to constitute a cause of bankruptcy against said respondent," and the District Court heard the demurrer, made an order "demurrer overruled," ordered respondent to answer (Trans. pages 44, 45), and after answer referred it to the referee "to ascertain and report the facts and his conclusions therefrom on the issues joined by the answer to the creditors' petition herein." (Trans. page 11.) No appeal was ever taken from these decisions.

3. At the hearings before the referee evidence was offered and admitted tending to prove, and proving, all the allegations in the petition, and especially that the bankrupt has always been in full possession and control of said property, and that "said deed was never delivered to said Ella M. Murphy, but that it has always been, and is now, in the possession of said Herman Murphy, who caused it to be recorded, and has had it in his possession before and ever since it was recorded." (Trans. page 23.) Ella M. Murphy testified before the referee as a witness subpoenaed by the petitioners.

The referee against petitioners' objection and subject to their exception admitted evidence that William Miller alone commenced an action in the Superior Court of the State of California, in and for the County of Alameda, against said Herman Murphy, Ella M. Murphy, and Progressive Investment Corporation, March 28, 1912, to cancel, set aside and vacate those recorded conveyances. At the time of the hearings before the referee said action was pending on a settled bill of exceptions, unheard motion for new trial, and duly filed notice of appeal. Neither of the petitioners, Ryan and Bazinet or Corrigan, were at any time parties to that action. (Trans. pages 4, 19, 53.) In said action Ella M. Murphy and Progressive Investment Corporation filed answers denying generally and specifically the allegations in the complaint. (Trans. page 53.)

4. Thereupon the referee refused to make or report on the said issues, or the said evidence "for the following reasons: First, that the deter-

mination of such issues in petitioners' favor would not establish the ultimate fact to be proven—namely, that William Miller will receive a preference by virtue of his purchase at the execution sale, such determination not being binding on the transferees who claim the property. Second, that the State Court having first acquired jurisdiction over the issues concerning the title to said property, it should, in my opinion, retain the same.” and concluded his report as follows:

“My conclusion is that the petition herein either should be dismissed, or further hearing stayed until the appeal aforesaid by William Miller from the judgment of the State Court can be determined.” (Trans. pages 7, 8,)

5. Exceptions were duly taken to the referee's report and heard by the District Court, which affirmed the report of the referee, denied the petition for adjudication and dismissed the proceedings. (Trans. page 27.)

The foregoing is the manner in which were raised the following questions:

1. Are the United States Courts *deprived of jurisdiction* in bankruptcy by a mere claim of ownership of the bankrupt's property, sold at sheriff's sale in violation of Section 3-a (1) of the Bankrupt Act, *regardless of whether that claim is groundless, or a mere fraud, or void, or valid?*

2. Can such a claim of ownership be shown by *incompetent evidence?*

3. Where the *alleged* claimants have full knowledge of, and are present at, the bankruptcy

proceedings and present no claim whatever to said property, is the fact that the referee in bankruptcy had heard from incompetent evidence that more than a year previous in another Court in another proceeding, acting in concert with the bankrupt by the same attorney, had filed an answer disputing an allegation that the bankrupt was the owner of said property, *a sufficient claim of ownership in the bankruptcy proceedings to deprive the Bankruptcy Courts of jurisdiction?*

4. Have the United States Bankruptcy Courts *jurisdiction to investigate the basis of such claim* to ascertain whether it is merely colorable, or whether there was any delivery of the deed, or any transfer whatever, regardless of motives or purposes, especially where it is alleged and proved that the bankrupt is and has been for years in continuous possession of the property?

5. Must the United States Bankruptcy Courts *dismiss the proceedings brought within four months after the Act of Bankruptcy*, so that if the adverse claims are thereafter *determined against the claimant* and in favor of the bankrupt estate it will be *too late to file a new petition in bankruptcy, as more than four months have passed* since the act of bankruptcy, and *fraud will thus be triumphant, when the intent and purpose of the law was to prevent such triumphs?*

6. Can the United States Bankruptcy Courts *determine the existence or non-existence of an alleged jurisdictional fact in order to exercise its own jurisdiction, and not to preclude or conclude any adverse claimant to any title he may have to any property so that the Court can make the*

necessary orders *continuing the proceedings to await the determination of the issues in another Court?*

7. If a referee in bankruptcy refuses to find or report on the issues specifically referred to him, has he any jurisdiction to find or report on any other issues which are not referred to him, especially on issues previously determined by the District Court and from which neither party has ever appealed?

8. Is it not error for the District Court to affirm such a report and act thereon by denying the petition for adjudication in bankruptcy and dismissing the proceedings?

II.

SPECIFICATION OF ERRORS RELIED UPON

The decree is erroneous in the following particulars:

1. It goes too far when it denies the petition for an adjudication and dismisses the proceedings, as the farthest it had jurisdiction to go was to stay the proceedings.

2. It denies the power of the Court to ascertain the existence, or non-existence, of every jurisdictional fact necessary to determine the question of jurisdiction.

3. It denies the power of the Court to investigate the existence, or the basis, of the alleged adverse claim of ownership of the property.

4. It affirms a referee's report which the referee had no jurisdiction to make.

5. It affirms a referee's report which distinctly states that it does not make any finding, or report, on the issues referred to the referee, but makes findings and report and suggestions on matters that had become *res judicata* and final and were not, and could not be, referred to the referee.

6. It affirms a referee's report made only on incompetent evidence.

7. It overrules the second exception to the referee's report (Trans. page 15), as said referee had no jurisdiction to make said report, not being on any of the issues referred to him.

8. It overrules the third exception to the referee's report, as said referee deliberately and wilfully refused to report on the issues referred to him and the report should, therefore, be rejected.

9. It overrules the fourth exception to the referee's report, as said referee knowing that the demurrer to the petition had been overruled and the time for appealing therefrom had expired and no appeal taken and no application made to change the decision overruling said demurrer and had passed beyond the power of the District Court to change it, said referee undertakes in his report to change and reverse said decision on said demurrer and deliberately refuses to pass upon the issues referred to.

10. It overrules the fifth exception to said referee's report, as said referee deliberately admitted the incompetent evidence on which he bases

his report, said evidence being a judgment and proceedings in an action in the State Court from which judgment there was an appeal, and a motion for new trial pending and undetermined, and to which action the petitioners, Corrigan, Ryan and Bazinet, were never parties.

11. It overrules the sixth exception to the referee's report, which shows the matters reported by the referee were not issues raised by the petition and answers and that there was no evidence on which to found the matters so reported.

12. It overrules the seventh exception to the referee's report, which shows the matters he reported on had become immaterial and were previously decided the other way by the District Court.

13. It overrules the eighth exception to the referee's report, which shows that there was no evidence whatever of any adverse claim in these proceedings.

14. It overrules the ninth exception, which shows that it was proved that Herman Murphy never delivered any deeds of this property; that at the date of the deed and ever since he was insolvent; that there was no consideration for the deed; that it was made and recorded by him for the purpose of hindering, delaying and defrauding his creditors, of which Ella M. Murphy and Progressive Investment Corporation had knowledge and participated therein; that Ella M. Murphy conveyed any interest she had to Progressive Investment Corporation June 2, 1910, and there were no further transfers, and the cor-

poration became defunct November 30, 1910, and that Herman Murphy has now, and always had, possession of the property since prior to July 19, 1906, and said corporation *did not, and could not, make any claim* to said property, and yet the referee made no finding on this evidence and refused to make any finding thereon.

15. The petition and the evidence showed that the record title stood in the name of a corporation November 30, 1910, when said corporation ceased to exist, and could not act thereafter, and it did not, and could not, make any adverse claim to said property July 21, 1913, or any other time.

ARGUMENT

I.

The District Court erred in denying the petition for adjudication and dismissing the proceedings (Trans. page 27; Nineteenth Assignment of error page 39) because:

1. The overruling of defendants demurrer August, 1913, and ordering Herman Murphy to answer was a decision that, if the facts alleged in the petition were proved, an adjudication must follow, and as no appeal was taken from that decision, and no application made to set it aside, it was binding on said District Court December 4, 1914. (Trans. page 45; Sixth Assignment page 31.)

U. S. Bank vs. Moss, 6 How. 31;
Clearwater vs. Meredith, 1 Wall;
Alley vs. Nott, 111 U. S. 475.

All points not set forth in the demurrer were waived.

Richards vs. Travelers, 80 Cal. 506;

Rhode Island vs. Massachusetts, 12 Pet. (U. S.) 675;

Dunlap vs. Schofield, 152 U. S. 244.

2. The bankrupt having filed an answer controverting certain facts alleged in the petition, the law provides that "*the judge shall determine, as soon as may be, the issues presented by the pleadings.*"

Bankrupt Act, Section 18, Subdivision D. (Trans. pages 45 to 49.)

The judge could not proceed any further until he *determined* "*the issues presented by the pleadings,*" and *he never made such determination.*

3. The *referee's report does not supply the defect*, because said report states that "I am making no finding upon such issues." (Trans. page 7; first and third exceptions pages 11 to 17; fourth assignment of error page 30.)

4. The *affirming* of the referee's report (Trans. page 27) does not supply any defects or even assist, because:

a) The referee had no jurisdiction to report, or even hear, or determine, any issue not raised by the answer to the creditors, as that was all that was referred to him. (Trans. pages 3, 11, 15, 29, 49.)

Branger vs. Chevalier, 9 Cal. 353;

Solomon vs. Maguire, 29 Cal. 227;

Litz vs. Linthicum, 8 Pet. 165;

Alexandria vs. Swan, 5 How 83;

Oteri vs. Scalzo, 145 U. S. 578.

(b) The decision of the District Court overruling the demurrer and thus deciding that the petition could be maintained was binding on the referee.

Sherman vs. Jenkins, 70 Hun. (N. Y.) 593;
24 N. Y. Suppl. 186;

Parcher vs. Dubvar, 118 Wis. 401; 95 N. W.
370;

Minnesota vs. Tuteur, 127 Wis. 382; 105 N.
W. 1067.

(c) The report of the referee was bad, not good for any purpose, and the Court should have sent it back to the referee with orders to obey the reference, or the Court should itself have proceeded to "determine the issues raised by the pleadings." (Fifth Assignment, pages 30, 31.)

York vs. Myers, 18 How. 246.

II.

None, or all, of the reasons given in the opinion for the decree of the District Court are sufficient or valid (Trans. page 27) because:

1. It was of no consequence what point the argument on the demurrer was directed to, as *the matter is to be decided by the record alone* and the record of the demurrer itself and that it was overruled and defendant ordered to answer in five days (Trans. page 45) had the same binding, legal effect on Court and referee, no matter what the argument that produced it, and could not be changed or ignored on hearing exceptions to the referee's report, or at any other time.

2. If authorities were requested for the proposition that a fraudulent transfer is *void and conveys nothing*, we could furnish them, and, therefore when property of a bankrupt is attached and the lawsuit is fought for seven years and the property then sold at sheriff's sale and the bankrupt permits it to be sold, while insolvent, he commits an act of bankruptcy, *notwithstanding the void transfer*. There was no transfer, it was a mere sham.

3. Even though it were necessary to have the sale "determined to be fraudulent in an action to which the transferee is a party," *that would be no ground for "denying the petition for adjudication and dismissing the proceedings,"* although it might be for *staying proceedings*; as the petition must be filed *within four months after the sale*, and if dismissed and later the sale is determined fraudulent and, *therefore, a plain act of bankruptcy, then the Bankruptcy Court had lost jurisdiction to entertain a creditor's petition.*

But for the *purpose of adjudication it is not necessary to have even a stay of proceedings*, as is hereinafter more fully shown.

4. No petitioning creditor "*complains that he himself has received a preference under such proceedings.*" The *receipt* of a preference is not an *act of bankruptcy*. The complaint is that *an act of bankruptcy was committed by permitting the property to be sold under legal process.* IT IS ABSOLUTELY IMMATERIAL WHO BOUGHT IT. Anyone is permitted to buy it.

5. Ryan and Bazinet are petitioners, having a judgment of more than \$600 and the number

of creditors being less than twelve, they did not purchase any property, and could maintain these proceedings alone; therefore, *it is immaterial what any other petitioner did or did not do.*

6. The law favors the collection of debts.

The bankruptcy act is *remedial*, and there is nothing in *law*, or *morals*, or *reason*, or *common sense*, or *justice*, to deter a creditor from presenting to the Court the fact *that a fraudulent debtor has committed acts of bankruptcy*, even though the complaining creditor purchased the property at public auction.

7. But the *injustice of this erroneous reason appears greater* when we reflect that *the property would be lost to the bankrupt estate if a petitioner did not buy it, as the very fact that he joins in the petition is an offer to deliver the property to the bankrupt estate, and avoids any preference.* Other fraudulently concealed property will be distributed to the creditor by the bankruptcy proceedings and justice done.

III.

There was no adverse claim, or any claim, to this property filed or presented in these proceedings, although Ella M. Murphy, president of the defunct corporation, testified as witness on subpoena of petitioners. (Trans. pages 9, 18, 19, 30.)

IV.

Ella M. Murphy having conveyed to the corporation any interest she had on June 2, 1910, had no claim, and Progressive Investment Cor-

poration having ceased to exist November '30, 1910, *could not make any claim in 1913.*

V.

The admission of the record and files in the action of William Miller vs. Herman Murphy, Ella M. Murphy, Progressive Investment Corporation, et al, commenced March, 1912, in the Superior Court, in Alameda County, for the purpose of setting aside these fraudulent conveyances, in which action it was alleged to be the property of Herman Murphy, which allegation was generally and specifically denied by Ella M. Murphy and Progressive Investment Corporation and from the judgment there was an appeal pending and a motion for new trial undetermined and granted while these proceedings were pending (Trans. page 19), was erroneous, because:

1. The pendency of the appeal made it incompetent evidence, even between the parties.

Di Nola vs. Allison, 143 Cal. 106; 65 L. R. A. 419.

2. Ryan and Bazinet not being parties to that action, it was inadmissible as to them.

3. It was no evidence that a claim existed in 1913.

4. The evidence was offered by Herman Murphy, and not by any alleged claimant. (Trans. pages 18, 22, 39.)

IV.

The Court could examine into the question of whether the alleged deeds were void or valid with-

out rendering a decision binding on any adverse claimant, because:

1. Every court of equity has power to determine the existence or non-existence of any fact necessary for the exercise of its own jurisdiction.

Morton vs. Broderick, 118 Cal. 481;

Byrne vs. Drain, 127 Cal. 668;

Mueller vs. Nugent, 184 U. S. 1.

2. The proceedings being in rem to determine the status of the bankrupt, the Court could proceed without having any other parties before it.

3. If Herman Murphy defaulted, the Court could have made an order of adjudication.

4. Bankruptcy Court can not delegate any of their own powers or duties to any other Court.

U. S. F. & G. Co. vs. Bray, 202 U. S. 207.

5. Where the conveyances are voluntary, while grantor is insolvent, the grantee does not have to have notice or knowledge and is not a necessary party, and fraudulent grantors are not necessary parties.

6. A transfer may be an act of bankruptcy, although the trustee may not be able to avoid the preference.

In re Drummond No. 4093, Fed. Cas. S. C., 1 N. B. R. 231; Sect. 60 of Bankrupt Act.

7. It appeared from petition, and evidence plainly shows, that these deeds were never delivered; that they were voluntary, without any consideration; that Herman Murphy was insolvent before and at the time and ever since the date they were made and recorded; and the alleged grantees knew it, and also knew they were

made and recorded for the purpose of hindering, delaying, and defrauding the creditors of Herman Murphy, and they participated in that intent and purpose and, therefore, said deeds were void and the property remained Herman Murphy's on March 24, 1913, when sold by the sheriff.

Judson vs. Lyford, 84 Cal. 505;

Scholle vs. Finnell, 166 Cal. 553.

Wherefore, appellants pray that the decree of the District Court be reversed, and directed to determine the issues of fact raised by the pleadings.

Respectfully submitted,

DANIEL O'CONNELL,

Solicitor for Appellants.

No. 2632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES R. RYAN, PETER BAZINET and
WILLIAM MILLER, Petitioning Creditors,
Appellants,

vs.

HERMAN MURPHY,

Appellee.

In the Matter of HERMAN MURPHY, Bankrupt.

PETITION FOR REHEARING

DANIEL O'CONNELL,
Solicitor for Appellants.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2632

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

JAMES R. RYAN, PETER BAZINET and
WILLIAM MILLER, Petitioning Creditors,
Appellants,

vs.

HERMAN MURPHY,

Appellee.

In the Matter of HERMAN MURPHY, Bankrupt.

PETITION FOR REHEARING

To the Honorable Circuit Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of James R. Ryan, Peter Bazinet and William Miller, petitioning creditors and appellants in the above-entitled cause sheweth unto your Honors that, being aggrieved by the decree entered in this cause on the seventh day of February, A. D. 1916, by which the appeal of your petitioners

from the decree of the District Court was dismissed, for the reason that the evidence before the Referee in Bankruptcy and before the District Court was not incorporated in the transcript on appeal.

In this a great injustice is done the appellants and *a rehearing should be granted on the following grounds:*

1. The appellants *did incorporate* in their bill of exceptions *for the purpose of presenting it to this Honorable Court* as a part of the transcript *all the material evidence presented to the Referee in Bankruptcy and the District Court and have always been ready and anxious to have it presented and considered by this Court*, but the District Court exercising its powers under Equity Rules 75 and 76 of the Supreme Court of the United States, struck it all out as shown on pages 49, 50 and 51 of the "Transcript of Record" as follows:

"Counsel for the petitioning creditors have sought to incorporate in this statement on appeal a summary of such evidence. Such summary was excluded from this statement for the reason * * *, and for the further reason that recital of such evidence is not at all essential to a determination by the Court of Appeals of the question of law involved in this appeal."

2. The questions which the District Court intended to present, and thought it had sufficiently

presented to the Circuit Court of Appeals have not been decided by the Circuit Court of Appeals for the reason that the *District Court and not the appellants prevented them being properly presented and this against the wishes of the appellants.*

3. The appellants are greatly damaged by reason of the decision of the Circuit Court of Appeals, and appellants are confident that on a rehearing, any deficiency of the record can be supplied and the decision of the District Court reversed.

Wherefore, your petitioner humbly prays that your Honors will grant a rehearing, humbly submitting to such orders as the Court may make if the application be without merit, or otherwise.

DANIEL O'CONNELL,

Solicitor for said Appellants.

I, Daniel O'Connell, counsel for the said petitioning creditors, hereby certify that in my judgment this petition for a rehearing is well founded and that it is not interposed for delay; that I know the facts to be stated in this petition for rehearing and that I personally expended a large sum of money

and many days and nights of hard labor preparing the summary of said evidence required by said Equity Rule, in order that it might meet with the approval of said District Court and be presented to this United States Circuit Court of Appeals.

DANIEL O'CONNELL,
Solicitor for said Appellants.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

Filed

SEP - 2 1915

F. D. Monckton,
Clerk.

No. 2636

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
VS.
GREAT NORTHERN RAILWAY COMPANY, a
Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

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Attorneys for Plaintiff and Plaintiff in Er-
ror,

and

CHARLES S. ALBERT, Esquire, Great Northern
Passenger Station, Spokane, Washington,

THOMAS BALMER, Esquire, Great Northern Pas-
senger Station, Spokane, Washington,

Attorneys for Defendant and Defendant in
Error.

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Complaint.

Now comes the United States of America, by
Francis A. Garrecht, United States Attorney for
the Eastern District of Washington, and brings this
action on behalf of the United States against the

Great Northern Railway Company, a corporation organized and doing business under the laws of the State of Minnesota, and having an office and place of business at Merritt, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, Page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 9, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918; said train being run over a part of a through highway of interstate commerce, and being [1*] then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction

*Page-number appearing at foot of page of original certified Record.

of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power of train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 11, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1900; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within [2] the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A THIRD CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 13, 1914, ran on its line of railroad its certain freight train, known

as No. 402, drawn by its own locomotive engine No. 1910; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of [3] said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FOURTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington .

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Stat-

utes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 14, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1917; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended. [4]

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FIFTH CAUSE OF ACTION,
plaintiff alleges that defendant is, and was during

all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 15, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, de-

fendant is liable to plaintiff in the sum of one hundred dollars [5]

FOR A SIXTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 16, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1911; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not con-

trolled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A SEVENTH CAUSE OF ACTION,
plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington. [6]

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 17, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1907; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the

jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), [7] and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 18, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1912; said train being run over a part of a through highway of interstate commerce, and being

then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A NINTH CAUSE OF ACTION,
plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March

2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 18, 1914, ran on its line of railroad its certain freight train, known as Extra East, drawn by its own locomotive engine No. 1904; said train being run [8] over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the

act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 20, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1921; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade [9] Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN ELEVENTH CAUSE OF ACTION,
plaintiff alleges that defendant is, and was during all

the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 21, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1904; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common [10] hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defen-

dant is liable to plaintiff in the sum of one hundred dollars.

FOR A TWELFTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 22, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1901; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section

1 of the aforesaid act of March 2, 1893, as [11]
amended.

Plaintiff further alleges that by reason of the violation of the said act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of twelve hundred dollars, and its costs herein expended.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Complaint. Filed December 18, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2075.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant.

Demurrer.

The above-named defendant now comes into court appearing by its attorneys, Charles S. Albert and Thomas Balmer, and says that the said complaint and each and every cause of action in said complaint and the matters therein contained, in the manner and

form as the same are therein stated and set forth, are not sufficient in law, and the said defendant is not bound by the law of the land to answer the same, and that this, said defendant is ready to verify.

WHEREFORE, the said defendant prays judgment that the said defendant be dismissed and discharged from the said premises in said complaint specified.

Said demurrer is based upon the following grounds:

1. That neither the said complaint nor any cause of action set forth in said complaint, states sufficient facts or grounds constituting an offense against the United States or any offense.

2. That neither said complaint nor any cause of action therein attempted to be set forth, states facts sufficient to constitute a cause or causes of action against the said defendant.

3. That the facts stated in said complaint and each and every cause of action therein set forth, do not state sufficient grounds constituting an offense against the United States or any offense, nor do they state any cause of action under the act of Congress entitled, "An Act to promote the safety of employees and [13] travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes," approved March 2d, 1893, as amended April 1st, 1896, as amended March

2d, 1903, and as amended April 14th, 1910.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Defendant.

[Endorsements]: Due service of the within Demurrer by a true copy thereof, is hereby admitted at Spokane, Washington, this 13th day of January, A. D. 1915.

FRANCIS A. GARRECHT,
Attorney for Plaintiff.

Demurrer. Filed in the U. S. District Court for the Eastern District of Washington, January 13, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.
[14]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2075.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant.

Stipulation [as to Certain Facts].

IT IS STIPULATED, that in consideration of the demurrer to each of the causes of action herein in this court or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action

that each engine was equipped with a power driving-wheel brake and appliances for operating a train-brake system, and that in each train not less than 85% of the cars therein were equipped with power or train-brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand-brakes.

Dated this 14th day of June, 1915.

(Signed.) FRANCIS A. GARRECHT,
M. C. LIST,

Attorneys for Plaintiff
CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington, July 9, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [15]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Opinion.

FRANCIS A. GARRECHT, U. S. Attorney.

M. C. LIST, Special Attorney.

CHARLES S. ALBERT, and THOMAS
, BALMER, for Defendant.

RUDKIN, District Judge:

This is an action to recover penalties for violations of the Safety Appliance Act of March 3, 1893 (27 Stat., 531), as amended by the act of April 1, 1896 (29 Stat., 85), as amended by the act of March 2, 1903 (32 Stat., 943). The complaint contains twelve counts or causes of action in all. The first count charges that the defendant, on the 9th day of July, 1914. ran a freight train engaged in the movement of interstate traffic from Cascade Tunnel to Merritt, in the State of Washington, and within the jurisdiction of this court, "when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by Section 1 of the aforesaid act of March 2, 1893, as amended."

For the purpose of our present inquiry the remaining eleven counts are in all respects similar to the first. A demurrer for want of sufficient facts has been interposed by the defendant, accompanied by a stipulation: [16]

That in consideration of the demurrer to each of the causes of action herein in this court or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action that each engine was equipped with a power driving-wheel brake and appliances for operating a train-brake system, and that in each train not less than 85% of the cars therein were equipped with power or train-brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand-brakes."

The sole question presented for decision therefore is, may a railroad company require or permit brakemen to use the common hand-brakes to control the speed of trains engaged in the movement of interstate traffic when the locomotives drawing the trains are equipped with power driving-wheel brakes and appliances for operating the train-brake system, and when not less than 85% of the cars in the train have their brakes used and operated by the engineers of the locomotives, as required by the order of the Interstate Commerce Commission of September 1, 1910, without incurring the penalty imposed by the act of 1893 and the amendments thereto.

Section 1 of the act of March 2, 1893, declares:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel

brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train-brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand-brakes for that purpose."

Section 2 of the act of March 2, 1903, provides:

"That whenever, as provided in said act, any train is operated with power or train-brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-brake cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the object of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train-brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission, shall be subject to the like penalty as failure to comply with any requirement of this section."

On the 6th day of June, 1910, the Interstate Commerce Commission promulgated the following order:
[17]

“It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train-brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in each such train which are associated together with the 85 per cent shall have their brakes so used and operated.”

Briefly stated, the railway company contends that having fully equipped its locomotives and cars as required by law and the order of the Interstate Commerce Commission, it has incurred no penalty, while the Government takes the broad position that the company must not only equip its locomotives and trains as required by the Interstate Commerce Commission, but must so equip them that the engineers on the locomotives drawing the trains can control their speed without requiring the brakemen to use the common hand-brakes for that purpose, and that the use of the hand-brakes for the purpose of controlling the speed of trains engaged in the movement of interstate traffic is *by implication* prohibited by the statute. These several contentions call for a construction of Section One of the act of 1893 and Section Two of the act of 1903. It occurs to me that these two sections are in irreconcilable conflict in so far as they relate to train-brake equipment and that the latter supersedes the former. Each section prescribes a standard to which the railroads of the country must

conform, but the two standards are radically different. The original act required the equipment of a sufficient number of cars with power or train-brakes, to control the speed of the train without the necessity of using hand-brakes for that purpose, while the amendment prescribes a fixed and definite standard. The standard prescribed by the original act was indefinite and uncertain at best. Under its provisions the sufficiency of the equipment must in every case be determined by a jury from expert testimony, and one jury might find that the equipment of 25% of the cars with power-brakes was sufficient, while under similar facts and conditions another jury might find that 50% was insufficient. To [18] obviate this uncertainty Congress, in my opinion, intended, by the amendment of 1903 to prescribe a fixed and definite standard, through the action of the Interstate Commerce Commission—a standard binding alike on the railroads and on the courts. If I am correct in this conclusion, the sufficiency of the equipment is determined by the order of the Interstate Commerce Commission and so much of the original act as required a sufficient equipment has been repealed. But if I am in error in this, I am still of opinion that the complaint in this case does not charge a violation of either act, or of both acts combined. It does not charge that a sufficient number of cars in the trains were not equipped with power or train-brakes to enable the engineers on the locomotives drawing the trains to control their speed, without requiring brakemen to use the hand-brakes for that purpose, as provided in the original

act; nor does it charge a failure to comply with the requirements of the Interstate Commerce Commission, as provided by the amendment. It charges matters upon which the acts of Congress are wholly silent. The purpose of Congress in the enactment of these laws is so apparent that it is unnecessary to look to either reports of the Interstate Commerce Commission or of Congressional committees for light in their construction. The inquiry, however, is not the evil against which the legislature is directed, but the remedy prescribed by Congress to correct that evil. A mere reference to the statutes will show that the legislation is limited exclusively to railroad equipment, and penalties are only prescribed for failure to furnish or provide that equipment. Congress no doubt thought that by requiring automatic couplers and power-brakes it would obviate the necessity of men going between the cars to couple or uncouple them, or of going on top of trains to use the hand-brake; but in this Congress may have been mistaken. If mistaken, and the remedy is inadequate, relief must be had through further congressional action, not through judicial legislation. If prohibited at all the use of hand-brakes [19] is only prohibited by implication; and crimes are not defined or created in that way. As said by Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76:

“The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on

the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-makers must govern in the construction of penal as well as other statutes. This is true, but this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say, so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its

provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

The case of *Johnson v. Southern Pacific Co.*, 196 U. S. 1, does not conflict with these views. It was there held that statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning, and the Court quoted approvingly the following language of Mr. Justice Story in *United States v. Winn*, 3 Sumner, 209:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport."

It is conceded in this case, and must be conceded, that if the use of hand-brakes to control the speed of trains is prohibited at all it is by implication only. As already stated, Congress has sought to obviate the necessity for going upon trains to use hand-brakes to control their speed by requiring the use of certain equipment and has imposed penalties for failure to furnish that equipment. [20] If it is now deemed necessary to go further and prohibit the railroads from requiring or permitting their employees to go upon trains to use the hand-brakes Congress must act. For the Court to impose pen-

alties for an act which Congress has not directly prohibited is judicial legislation which finds no warrant under our system of government. I am not unmindful of the fact that the Circuit Court of Appeals for the Fourth Circuit reached a different conclusion on a somewhat similar state of facts in the recent case of *Virginia Railway Co. v. United States*, decided May 4th, 1915, but the Court there conceded that the use of hand-brakes is prohibited *by implication only*, and I am unwilling to subscribe to the doctrine that a crime may be defined or worked out in that way. For aught that appears on the face of the complaint in this case the defendant has equipped its engines and trains with every safety appliance required by law, and for failure to do this, and for nothing else, has Congress prescribed penalties.

The demurrer is sustained and the action dismissed.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington. July 8, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [21]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

Judgment.

This cause came on regularly to be heard before the Honorable Frank H. Rudkin, Judge, plaintiff appearing by Francis A. Garrecht, United States Attorney, and M. C. List, Special Attorney, and defendant appearing by Charles S. Albert and Thomas Balmer, attorneys for defendant, upon the demurrer by the defendant to the complaint and each and every cause of action in said complaint, setting forth that the same are not sufficient in law, and the defendant is not bound by the law of the land to answer the same, praying judgment that it be dismissed and discharged from the premises in said complaint specified, the grounds being set forth in said demurrer that neither the said complaint nor any cause of action set forth in said complaint stated sufficient facts or grounds constituting an offense against the United States, or any offense, nor stated facts sufficient to constitute a cause or causes of action against the de-

fendant, and that the facts stated therein did not state sufficient grounds constituting an offense against the United States or any offense, nor any cause of action under the act of Congress entitled, "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes," approved March 2d, 1893, as [22] amended April 1st, 1896, as amended March 2d, 1903, and as amended April 14th, 1910; and a stipulation of facts having been filed by the respective parties, and after argument of counsel and after consideration thereof and of said stipulation, the Court being duly advised in the premises, found for the defendant, sustaining said demurrer and dismissing said action:

It is therefore CONSIDERED and ADJUDGED that the said demurrer be, and the same is hereby, sustained to said complaint and to each and every cause of action therein, and that the said plaintiff, the United States of America, take nothing by this action, and that said action and each and every cause of action therein set forth be, and the same is hereby, dismissed, and said defendant is hereby discharged from the premises in said complaint contained.

Dated this 9th day of July, 1915.

By the Court:

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Judgment Filed in the U. S. District Court for the Eastern District of Washington, July 9, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [23]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

Order Extending Time to File Bill of Exceptions.

Upon motion of Francis A. Garrecht, United States Attorney for the Eastern District of Washington, it is

ORDERED that the time in which plaintiff may serve and file its bill of exceptions in the above-entitled cause be, and the same is, extended to and including the 15th day of August, A. D. 1915.

Done in open court this 17th day of July, A. D. 1915.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Extending Time to File Bill of Exceptions. Filed July 17, 1915. W. H. Hare, Clerk. [24]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2075.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Assignment of Errors.

Now comes the United States of America, by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and says that in the record and proceedings herein in the District Court of the United States for the Eastern District of Washington there is manifest error to the great prejudice of the said United States of America, to wit:

1. The said District Court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, when its speed was controlled by the brakemen using the common hand-brake for that purpose.

2. The said District Court erred in sustaining

the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said [25] defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, and did then and there require the brakemen to use the common hand-brake to control the speed of said train.

3. That said District Court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its lines of railroad the train mentioned in each and every cause of action of said complaint, when its speed was not controlled exclusively by the power or train-brakes used and operated by the engineer of the locomotive engine drawing said train.

4. The said District Court erred in sustaining said demurrer, for the reasons that the matters set forth in each and every cause of action of said complaint constitute a cause of action against said defendant.

5. The said District Court erred in rendering judgment in favor of the said Great Northern Railway Company and against the said United States of America upon each and every cause of action of

said complaint, for the reasons stated in the foregoing assignments of error.

WHEREFORE, by reason of the errors aforesaid, the said United States of America prays that the judgment rendered and entered in this action be avoided, annulled and reversed, and that the same be remanded with instructions to overrule the demurrer of said Great Northern Railway Company to said complaint and to each and every cause of action of the same.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Assignment of Errors. Filed July 30, 1915. W. H. Hare, Clerk. [26]

*In the District Court of the United States, for
the Eastern District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Petition for Writ of Error.

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the judgment entered herewith on the 9th day of July, 1915, sustaining the demurrer interposed to the complaint by the said defendant and dismissing the complaint on file herein, and in the record and proceed-

ings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignment of errors filed herein in aid of this petition for a Writ of Error.

WHEREFORE, said plaintiff, United States of America, prays that a Writ of Error be issued in this behalf out of the Circuit Court of Appeals of the United States in accordance with the provisions of the laws of the United States, for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Petition for Writ of Error.
Filed July 30, 1915. W. H. Hare, Clerk. [27]

*In the District Court of the United States, for
the Eastern District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

Order Allowing Writ of Error.

The plaintiff, United States of America, having this day filed its petition for a Writ of Error from

the judgment entered herein on the 9th day of July, A. D. 1915, sustaining the demurrer interposed by the defendant to the complaint herein and dismissing said action, to the Circuit Court of Appeals of the United States, together with an Assignment of Errors specifying the matters complained of, and of which it will complain. Now, therefore, it is

ORDERED that a Writ of Error be and hereby is allowed for the purpose of review in the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the judgment heretofore entered herein.

Done in open court this 30th day of July, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Writ of Error.
Filed July 30, 1915. W. H. Hare, Clerk. [28]

*In the District Court of the United States, for
the Eastern District of Washington, Northern
Division.*

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that this matter having

come on to be heard before the Honorable Frank H. Rudkin, United States District Judge; plaintiff appearing by Francis A. Garrecht, United States Attorney, and M. C. List, Special Assistant United States Attorney, and defendant appearing by Charles S. Albert, Esquire, and Thomas Balmer, Esquire, upon the demurrer of the defendant to the complaint filed in the above-entitled cause; and counsel having agreed to certain facts which were embodied in a stipulation and filed by the parties hereto, as follows, to wit:

“IT IS STIPULATED, that in consideration of the demurrer to each of the causes of action herein in this court or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action that each engine was equipped with a power driving-wheel brake and appliances for operating a train-brake system, and that in each train not less than 85% of the cars therein were equipped with powered or train-brakes, which were used and operated by the [29] engineer of the locomotive drawing such train, to control its speed in connection with the hand-brakes.

Dated this 14th day of June, 1915.

FRANCIS A. GARRECHT,
M. C. LIST,

Attorneys for Plaintiff.

CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Defendant.

And after argument of counsel, and consideration of the same and of said stipulation, and the matter

having been taken under advisement, the Court filed its judgment sustaining the demurrer herein and dismissing said action.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Service of a copy of the within Bill of Exceptions hereby acknowledged this 30th day of July, A. D. 1915.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

Bill of Exceptions. Filed July 30, 1915.

(Signed) W. H. HARE,
Clerk. [30]

*In the Circuit Court of Appeals of the United States,
for the Ninth Circuit.*

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

Writ of Error [Copy].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to the Honorable,
the Judges of the District Court of the United
States for the Eastern District of Washington,
Northern Division, Greeting:

Because of the record and proceedings as also in
the rendition of the judgment sustaining the demur-

rer interposed by the defendant to the complaint and dismissing said action, in the case pending before you, or some of you, between the United States of America, Plaintiff, and Great Northern Railway Company, Defendant, a manifest error hath happened to the great damage of the plaintiff, United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment sustaining the demurrer to the complaint and dismissing said action be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, [31] on the 28 day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 30th day of July, in the year of our Lord, one thousand nine hundred and fifteen, and in the one hundred and fortieth year of the Independence of the United States.

The above writ is hereby allowed.

(Signed) FRANK H. RUDKIN,
United States District Judge, for the Eastern Dis-
trict of Washington.

[Seal] Attest:

(Signed) W. H. HARE,
Clerk United States District Court, Eastern District
of Washington.

[Endorsements]: Writ of Error. Filed July 30,
1915. W. H. Hare, Clerk. [32]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant in Error.

Citation [Copy].

The President of the United States of America, to
the Great Northern Railway Company, and to
Charles S. Albert, Esquire, Your Attorney,
Greeting:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at a session of the United
States Circuit Court of Appeals, for the Ninth Cir-
cuit, to be held at the City of San Francisco, in the
State of California, within thirty days from the date
of this Citation, pursuant to a Writ of Error filed in
the office of the Clerk of the District Court of the
United States for the Eastern District of Washing-

ton, wherein the United States of America is Plaintiff in Error, and you, the said Great Northern Railway Company, is Defendant in Error, to show cause, if any there be, why the judgment rendered against the plaintiff in error sustaining defendant's demurrer to the complaint and dismissing said action, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 30th day of July, 1915, and in the One Hundred and Fortieth year of the Independence of the United States.

FRANK H. RUDKIN,
United States District Judge.

[Seal] Attest: W. H. HARE,
Clerk United States District Court, Eastern District
of Washington. [33]

[Endorsements]: Service of a Copy of the Within
Citation hereby acknowledged this 30th day of July,
A. D. 1915.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant in Error.

Citation. Filed July 30, 1915. W. H. Hare,
Clerk. [34]

*In the District Court of the United States, for
the Eastern District of Washington, Northern
Division.*

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Praeceptum for Record.

To the Clerk of the United States District Court for
the Eastern District of Washington, Northern
Division:

YOU ARE HEREBY REQUESTED in making
up your return to the Citation on appeal herein, to
include therein the following:

Complaint;

Demurrer to Complaint;

Stipulation of Facts;

Opinion of Court;

Judgment;

Assignment of Errors;

Petition for Writ of Error;

Order Allowing Writ;

Bill of Exceptions;

Writ of Error;

Citation;

Praeceptum;

Order Extending Time to File Bill of Excep-
tions,

which include all of the papers, records and other pleadings necessary to the hearing of the Writ of Error in the United States Circuit Court of Appeals, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said Citation.

Dated this 30th day of July, A. D., 1915.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Service of a copy of the within Praecipe for Transcript of Record is hereby acknowledged this 30th day of July, A. D. 1915.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

Praecipe for Transcript of Record. Filed July 30, 1915. W. H. Hare, Clerk. [35]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, for
the Eastern District of Washington, Northern
Division.*

No. 2075.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation.

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages are a full, true, correct and complete copy of the record, papers and other proceedings in the foregoing entitled cause as called for by the plaintiff and plaintiff in error in its praecipe as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitute the record on Writ of Error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which Writ of Error was lodged and filed in my office on July 30, 1915.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in this cause.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amounts to the sum of \$14.45, which sum will be included in my quarterly account as clerk against the United States, plaintiff and plaintiff in error, for the quarter ending September 30, 1915. [36]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

at Spokane, in said District, this 7th day of August, 1915.

[Seal]

W. H. HARE,
Clerk. [37]

*In the Circuit Court of Appeals of the United States,
for the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant in Error.

Writ of Error [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to the Honorable,
the Judges of the District Court of the United
States for the Eastern District of Washington,
Northern Division, Greeting:

Because of the record and proceedings as also in
the rendition of the judgment sustaining the demur-
rer interposed by the defendant to the complaint and
dismissing said action, in the case pending before
you, or some of you, between the United States of
America, Plaintiff, and Great Northern Railway
Company, Defendant, a manifest error hath hap-
pened to the great damage of the plaintiff, United
States of America, as by its complaint appears. We
being willing that error, if any hath been, should be
duly corrected and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment sustaining the demurrer to the complaint and dismissing said action be therein given, that then under your seal distinctly and openly, you sent the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, [38] on the 28 day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 30th day of July, in the year of our Lord, one thousand nine hundred and fifteen, and in the one hundred and fortieth year of the Independence of the United States.

The above writ is hereby allowed.

FRANK H. RUDKIN,
United States District Judge, for the Eastern District of Washington.

[Seal] Attest: W. H. HARE,
Clerk United States District Court, Eastern District of Washington. [39]

[Endorsed]: No. 2075. In the Circuit Court of Appeals. United States of America, Plaintiff in Error, vs. Great Northern Railway Company, De-

fendant in Error. Writ of Error. Filed July 30, 1915. W. H. Hare, Clerk. By _____, Deputy. No. 2036. Filed Aug. 10, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By _____, Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Defendant in Error.

Citation [Original].

The President of the United States of America, to
the Great Northern Railway Company, and to
Charles S. Albert, Esquire, Your Attorney,
Greeting:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at a session of the United
States Circuit Court of Appeals, for the Ninth Cir-
cuit, to be held at the City of San Francisco, in the
State of California, within thirty days from the date
of this Citation, pursuant to a Writ of Error filed in
the office of the Clerk of the District Court of the
United States for the Eastern District of Washing-
ton, wherein the United States of America is Plain-
tiff in Error, and you, the said Great Northern Rail-
way Company, is Defendant in Error, to show cause,
if any there be, why the judgment rendered against
the plaintiff in error sustaining defendant's demur-

rer to the complaint and dismissing said action, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 30th day of July, 1915, and in the One Hundred and Fortieth year of the Independence of the United States.

FRANK H. RUDKIN,
United States District Judge.

[Seal] Attest: W. H. HARE,
Clerk United States District Court, Eastern District
of Washington.

[Endorsed]: No. 2075. In the Circuit Court of Appeals. United States of America, Plaintiff in Error, vs. Great Northern Railway Company, Defendant in Error. Citation. Filed July 30, 1915. W. H. Hare, Clerk. By ———, Deputy. No. 2636. Filed Aug. 10, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By ———, Deputy Clerk.

Service of a copy of the within citation hereby acknowledged this 30th day of July, A. D. 1915.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant in Error.

[Endorsed]: No. 2636. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. Great Northern Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 10, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

14
No. 2636.

**United States Circuit Court of Appeals,
Ninth Circuit.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

v.

GREAT NORTHERN RAILWAY COMPANY, A CORPORA-
TION, DEFENDANT IN ERROR.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.*

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FRANCIS A. GARRECHT,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

Filed

SEP 21 1915

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF	}	No. 2636.
in error,		
v.		
GREAT NORTHERN RAILWAY COMPANY,		
a corporation, defendant in error.		

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This suit consisting of 12 counts was brought against the Great Northern Railway Co. to recover penalties for violations of the safety-appliance act approved March 2, 1893 (27 Stat. L., 531), as amended by the act of April 1, 1896 (29 Stat. L., 85), and as amended by the act of March 2, 1903 (32 Stat. L., 943).

The first count, after alleging that defendant is a common carrier engaged in interstate commerce, states that:

Said defendant on July 9, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918, said train being run over a part of a through highway of interstate commerce and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid act of March 2, 1893, as amended.

Counts Nos. 2 to 12 are identical with count No. 1, except as to dates, train numbers, and engine numbers.

To this complaint, defendant filed its demurrer, assigning three causes therefor:

That neither said complaint nor any cause of action set forth in said complaint states sufficient facts or grounds constituting an offense against the United States or any offense.

That neither said complaint nor any cause of action therein attempted to be set forth states facts sufficient to constitute a cause or causes of action against the said defendant.

That the facts stated in said complaint and each and every cause of action therein set forth do not state sufficient grounds constituting an offense against the United States or any offense, nor do they state any cause of action under the act of Congress entitled "An act to

promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes and for other purposes," approved March 2, 1893, as amended April 1, 1896, as amended March 2, 1903, and as amended April 14, 1910.

In addition to the demurrer the following stipulation appears:

It is stipulated, that in consideration of the demurrer to each of the causes of action herein in this court, or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action that each engine was equipped with a power-driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85 per cent of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. (Rec., p. 18.)

The district court sustained the demurrer and dismissed the action.

The assignments of error are as follows:

1. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every clause of action of said complaint, for the reason that it appears from said complaint that said defendant operated

over its line of railroad the train mentioned in each and every cause of action of said complaint, when its speed was controlled by the brakemen using the common hand brake for that purpose.

2. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, and did then and there require the brakemen to use the common hand brake to control the speed of said train.

3. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, when its speed was not controlled exclusively by the power or train brakes used and operated by the engineer of the locomotive engine drawing said train.

4. The said district court erred in sustaining said demurrer, for the reasons that the matters set forth in each and every cause of action of said complaint constitute a cause of action against said defendant.

5. The said district court erred in rendering judgment in favor of said Great Northern Railway Company and against the said United States of America upon each and every cause of action of said complaint, for the reasons stated in the foregoing assignments of error.

The material part of the act in question is as follows:

THE STATUTE.

(27 Stat. L., 531, approved Mar. 2, 1893; amended by 29 Stat. L., 85, Apr. 1, 1896.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

* * * SEC. 6 (as amended Apr. 1, 1896). That any such common carrier using any locomotive engine, *running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of*

the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered, etc. * * *

AMENDED ACT.

(32 Stat. L., 943, approved Mar. 2, 1903.)

SEC. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; *and all power-braked cars in such train* which are associated together with said fifty per centum *shall have their brakes so used and operated*; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

POINTS AND AUTHORITIES.

1. Use of hand brakes to control speed of trains is unlawful. *Virginian Ry. v. United States* (4th C. C. A.; 223 Fed., 748).

2. Legislative history of act indicates that one of the leading purposes of the act was to keep brakemen off the tops of cars moving in trains.

House Report No. 3014, 51st Cong., 1st sess., p. 1, being report of House Committee on Railways and Canals on House bill No. 9682, made Aug. 25, 1890.

House Report No. 1678, 52d Cong., 1st sess., p. 3. Cong. Rec., Feb. 8, 1893, p. 1381, chairman of Committee on Interstate Commerce, Senator Cullom, explains purpose and scope of bill.

Cong. Rec., Feb. 10, 1893, p. 1500.

11 Ann. Rep. Interstate Commerce Commission, p. 129.

13 Ann. Rep. Interstate Commerce Commission, p. 55.

14 Ann. Rep. Interstate Commerce Commission, p. 78, et seq.

3. The express words in the first section of the act, "without requiring brakemen to use the common hand brakes" in controlling the speed of train, indicates unmistakably the congressional purpose to make such use unlawful. (27 Stat. L., 531.)

4. The later statutory requirement of an efficient hand brake on each car (act of Apr. 14, 1910) does not and was not intended to authorize their use to control the speed of moving trains. Senate Report No. 250, February 18, 1910.

5. A statute "directing a thing to be done in a certain manner implies that it shall not be done in any other manner." Potter's Dwarrris on Statutes and Constitutions, p. 228, note 30, and cases cited.

QUESTION INVOLVED.

Does the safety-appliance act prohibit and make unlawful the use of the common hand brake in controlling the speed of a train on an interstate highway?

The facts upon which this case is predicated, as set forth in the complaint and stipulation, are, briefly:

Each of the 12 trains in question had its speed controlled by the use of hand brakes between Cascade Tunnel and Merritt in the State of Washington on the line of the defendant in error's railroad, which railroad was engaged in interstate commerce; and

Each of the 12 trains in question was equipped with power or train brakes, 85 per cent of which were connected up and used in connection with the hand brakes in controlling the speed thereof.

In other words, the *speed of the train was not controlled* by the use of the power or train brakes operated by the engineer of the locomotive drawing such train, but by the hand brake assisted by the power brake, or by the power brake assisted by the hand brake; that is, its speed was not controlled "without requiring brakemen to use the common hand brake for that purpose."

PURPOSE AND INTENT OF CONGRESS.

The purpose and object of a law is the key to its interpretation.

The purpose and object of the air-brake provision of the safety-appliance law was to remove the

menace to trainmen resulting from their presence on tops of cars to manipulate the hand brake.

As the purpose of the coupler provision was to keep employees from the danger of going between cars to couple or uncouple them, so the object of the train-brake provision was to keep men from going on the tops of cars to set hand brakes.

A train brake operated by the engineer was substituted for the hand brakes operated by the train crew. To be sure the car brake or hand brake could still be used when the car was isolated or separated from the train, but whenever cars were joined together and attached to the locomotive for hauling or movement so that a train existed, then the braking was to be done by the train brake operated by the engineer. That such was the purpose and object of the train-brake provision is made clear from the legislative history of the act to which we are at liberty to refer.

House bill No. 9682, reported favorably by the House Committee on Railways and Canals on August 25, 1890, contained practically the same provision relative to the control of the speed of trains as does the present law, and in its report that committee said:

The object of this bill, as partly set forth in its title, is to require those using railroad cars in the work of interstate commerce to so equip the cars with such safety or automatic safety couplers as will not require trainmen to go between the ends of the cars

to couple or uncouple them, *or to go on top of the cars to use hand brakes in controlling the speed of trains, as it is now the general custom to do, resulting in such serious consequences, as shown by the following statements.* (H. Rep. No. 3014, 51st Cong., 1st sess., p. 1.)

Now, when it is remembered that of the thousands of brakemen injured and killed yearly, not 1 per cent of these are injured in coupling passenger cars or of handling brakes on such cars, simply because these cars have brakes controlled by the engineer, and when also it is now well known that automatic couplers and power brakes are as practically applicable to freight as to passenger cars (p. 5).

The House Committee on Interstate Commerce, before which was advocated a provision "to obviate the necessity of men traveling on tops of cars to handle the hand brakes in controlling the train," in favorably reporting House bill No. 9350, which bill is the present law, said:

The number killed in falling from trains and engines was 561, and the number injured was 2,363; that is to say, 38 per cent of the total number of deaths and 46 per cent of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger would largely reduce the total losses of life and limb.

REMEDY SUGGESTED.

It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of the men going between the cars, and *continuous train brakes* that can be operated from the locomotive and *dispense with the use of men on the tops of the cars*; that the locomotive should be provided with power driving-wheel brakes, rendering them easy of control. (H. Rep. 1678, 52d Cong., 1st sess., p. 3.)

The brakes *now* have to be largely operated by the brakemen, traveling over the tops of the cars by night and day, through sleet and rain, exposed to great danger of falling from the cars, *or from overhead obstructions*.

But with the train brake that can be immediately applied to the entire train, the necessity of their going on top of the cars is obviated and a great measure of safety to all who travel will be brought into general use; for when the rails are in constant use by passenger and freight trains, indiscriminately running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike. No opposition has been heard to this requirement. [Our italics.]

Hon. Shelby M. Cullom, of Illinois, chairman of the Committee on Interstate Commerce, who favorably reported the bill and had charge of it on the

floor of the Senate, explained this feature of the bill as follows:

Senator CULLOM. The purpose of the committee in this bill is simply to provide for a uniform coupler and for an air brake about which there shall be no particular controversy. When we get the cars of this country equipped with uniform couplers, with air brakes, so that the men will not be required to go between the cars, *so that the men who are on top of the cars to-day will be taken off and thereby relieved from the danger of such positions*, there will be no occasion for any further legislation on the subject, in my judgment. (Cong. Rec., Feb. 8, 1893, p. 1381.)

Senator CULLOM. * * * Here are some further statistics of the number falling from trains and engines. With reference to that, I desire to say that there is a provision in the bill *looking to getting rid of the necessity of trainmen standing upon the tops of cars and running from one car to another to turn the hand brakes*. One purpose of the bill is to *get rid of the necessity for the men to go on the tops of cars and to run from one to another*, as well as to provide against the necessity of the switchmen going in between the cars to couple and uncouple. There are some statistics on the subject of falling from trains and engines. [Our italics.]

Senator McPherson, of New Jersey, explained this provision of the law in these words:

Senator McPHERSON. * * * Section 1 provides that there shall be power applied

to the engine which will enable a train to be controlled by a brake, so that in a season of the year like the present, when the cars are covered with ice, *a brakeman shall not be required to run from one end of the train to the other, and in that way endanger life and limb, for the purpose of braking the train. Now, that is a very proper provision.* (Cong. Rec., Feb. 10, 1893, p. 1500.) [Our italics.]

In referring to the act in its eleventh annual report, the Interstate Commerce Commission makes this statement:

The first section prohibits a carrier from hauling a train in interstate traffic which is not controlled by train brakes. * * * The requirement, therefore, is not that a carrier shall equip its cars with the brake or the coupler, but that it shall not use in interstate traffic a train which is not controlled by the train brake. * * * (11 Ann. Rep. I. C. C., p. 129.)

Again, in its Thirteenth Annual Report, the Commission said:

It is believed that the number of killed and injured by falling from trains must be very largely reduced when the train brake comes into general use. The men will not then be obliged to use the tops of the cars for braking, nor to walk on the running boards. The freight train will be as completely under control of the engineer as passenger trains are at the present time. The number of

killed and injured from this cause is as great as, if not greater, than the number of killed and injured in coupling and uncoupling cars (p. 55).

In its Fourteenth Annual Report, again, the Commission said:

In last year's report mention was made of the large number of persons killed or injured by falling from trains. The casualties from this cause during the year ending June 30, 1898, were: Killed, 473; injured, 3,859. For 1899 the fatal accidents were 459, as compared with 644 for the year 1893. The injuries not fatal were 3,970, as compared with 3,780 for the year 1893. It is believed that the accidents resulting from falling from trains will be greatly reduced in time through the general use of the train brake. (14 Ann. Rep. I. C. C., pp. 78 et seq.)

In judicial decisions upon this section of the safety-appliance act there are found expressions of opinion which justify the position of the plaintiff in error that the purpose and object of the power or train-brake provision of the statute was aimed at the danger to men going on the tops of cars to manipulate the hand brakes.

Circuit Judge Knapp in *The Virginian Railway Company v. The United States* (223 Fed., 748), a case involving the identical issue raised in the instant case, in the course of his opinion said:

In our judgment the legislation here considered manifests the plain intention of Con-

gress to require the control of trains in ordinary line movement by the train brakes prescribed and to make unlawful the use of hand brakes for that purpose. True, the use of hand brakes is not in express terms prohibited, but this is the necessary implication of the language used, and it admits of no other reasonable construction. It was the evident purpose of the train-brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep employees from going between cars, so the object of the train brake is to keep employees from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation, as the courts have repeatedly said.

It is sufficient to add that the views herein briefly expressed are supported by numerous decisions construing the analogous language of other sections of the safety-appliance law: *United States v. C. N. W. R. R. Co.*, 157 Fed., 321; *Atlantic Coast Line v. U. S.*, 168 Fed., 165; *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 198 Fed., 637; *Delk v. S. L. & S. F. R. R. Co.*, 220 U. S., 580; *Southern Ry. Co. v. U. S.*, 222 U. S., 20.

In *Erie Railroad Co. v. United States* (197 Fed., 287), the court said of this act:

Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving

brakemen, as far as possible, from the dangers incurred in manipulating hand brakes. [Our italics.]

And later in the course of that opinion its purpose is referred to as “to obviate as far as possible the danger to men working hand brakes on icy footings.”

Judge Hazel, in *United States v. Grand Trunk Railway of Canada* (203 Fed., 775), cited with approval in 237 U. S., 402, in construing this provision of the law, said:

The statute, which is broadly phrased, does not contain any exceptions or specifically refer to yard movements or switching movements or to *any conditions under which such power brakes are not required to be controlled by the engineer*, * * *.

There is no appreciable hardship to the defendant in requiring compliance with the provisions of the act, *which obviously was passed to minimize dangers and risks to which brakemen and switchmen are subjected.* [Our italics.]

As the court said in *Atchison, T. & S. F. Ry. Co. v. United States* (198 Fed., 637), also cited with approval in 237 U. S., 402, with reference to a movement of a train without air brakes being operative within terminal limits:

But, in our opinion, Congress, in requiring a train to be “so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed with-

out requiring brakemen to use the common hand brake for that purpose," employed the word "brakemen" generically as including any and all men, whether specifically known as "conductors" or "brakemen" or "yard foremen" or "switchmen," whose duties in connection with the train would oblige them to use the common hand brakes in the absence of air brakes, and *intended that the engineer should be able to "control the speed"* and bring quickly to a standstill a train moving slowly through a congested region of drawbridges and railroad crossings as well as a train moving rapidly on a single clear track in the country. * * * and the dangers to the men engaged in moving those cars and to the interstate traffic itself were at least as imminent as the dangers on the "road."

In the case of *The United States v. Chicago, Burlington & Quincy Railroad Company* (237 U. S., 410), Mr. Justice Van Devanter, in the course of the opinion, said:

Giving effect to the views quite recently expressed in *United States v. Erie Railroad Company*, ante, p. 402, we think these trains came within the air-brake requirements, which the amendatory act of 1903 declares "shall be held to apply to all trains * * * on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but

moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passenger and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated.

Now, what are these “dangers” which Congress had in mind and to which the courts refer?

They were clearly the dangers of falling or being thrown from the cars; from passing over the tops of cars, ice covered, or in the dark to reach the hand brakes on different cars; the passing over cars of different heights; being struck by overhead obstructions, such as bridges, tunnels, etc.

When coupler conditions of a car *necessitate* the presence of employees between cars to couple or uncouple them, the act is violated.

So when brake or train conditions require the presence of men on top of the cars to manipulate hand brakes to control the speed of the train, the act is violated.

The literal provisions of the act are so similar in the coupler and air-brake provisions that a similar

construction of the air-brake clause to that familiar now in the interpretation of the coupler section seems to be logically necessary.

The purpose of the act to take men from the tops of the cars while in trains, can not be qualified or limited or restricted.

Any such qualification or limitation would nullify, to a large extent, the purpose of Congress in legislating for the purpose of taking men off the tops of the cars.

No court should interpret the act to permit, to any extent, the existence of the dangers which Congress intended to eliminate.

CONTEMPORANEOUS CONSTRUCTION.

In its Seventeenth Annual Report, in speaking of the amendment of 1903, which required that at least 50 per cent of the train or power brakes in each train should be operated, the Commission said:

At the same time the railroads are in no way relieved from the obligation to have a "sufficient" number of "air cars" on every train. In cases where, because of steep grades or high speed, safety requires more than the 50 per cent specified in the amendment, the railroad is responsible, in accordance with the terms of the original law, for the use of enough power brakes to insure efficient control of speed without hand brakes. (17 Ann. Rep. I. C. C., p. 84.)

It is respectfully submitted that this construction of the act, made by the Interstate Commerce Com-

mission, while not conclusive upon the courts, is entitled to consideration and should be supported unless it is clearly and plainly an erroneous interpretation.

The contemporaneous construction of a statute by those charged with the duty of executing it is "entitled to very great weight." (White, Justice, in *United States v. Trans-Missouri Freight Association*, 166 U. S., 290-370.) Such construction is entitled to "most respectful consideration that ought not to be overruled without cogent reasons." (Swayne, Justice, in *United States v. Moore*, 95 U. S., 763.)

The rule is also stated in the following cases:

Heath v. Wallace, 138 U. S., 582.

Merritt v. Cameron, 137 U. S., 552.

United States v. Pugh, 99 U. S., 269.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret." (Justice Swayne in *United States v. Moore*, *supra*.)

"It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." (Chief Justice Waite in *United States v. Pugh*, *supra*.)

“Moreover, if the question be considered in a somewhat different light, viz. as the contemporaneous construction of a statute by those officers of the Government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.” (Justice Lamar in *Heath v. Wallace*, *supra*.)

The following cases also follow the rule with respect to contemporaneous construction:

Edwards' Lessee v. Darby, 12 Wheat., 210.

Brown v. United States, 113 U. S., 586.

Pennell v. Philadelphia & Reading Ry. Co.,
231 U. S., 675.

Delano, et al., Receivers of Wabash R. Co., v.
United States, 220 Fed., 635.

The safety-appliance act as amended applies to all trains and cars used on any railroad engaged in interstate commerce.

The safety-appliance act applies to all cars and trains operated by carriers of interstate commerce over an interstate railroad, and the act makes uniform regulations affecting all railroads and parts of railroads in all the States. It establishes only one system, applicable alike to all interstate railroads throughout the whole country.

In the case of *United States v. Erie R. Co.* (237 U. S., 402) Mr. Justice Van Devanter, delivering the opinion of the court, said:

The first section makes it unlawful, among other things, for a railroad company engaged in interstate commerce "to run any train" in such commerce without having a sufficient number of the cars so equipped with train brakes—commonly spoken of as air brakes—that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." * * * The act of 1903, by its first section, provides that the requirements of the original act respecting train brakes, automatic couplers, and grab irons shall be held to apply to "all trains" and cars "used on any railroad engaged in interstate commerce," * * *.

It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision.

* * * Thus it is plain that, in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling

their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should "be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains.

Again, in the case of *United States v. Chicago, B. & Q. R. Co.* (237 U. S., 410), Mr. Justice Van Devanter said:

Giving effect to the views quite recently expressed in *United States v. Erie Railroad Company*, ante, p. 402, we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares "shall be held to apply to all trains * * * on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. * * * Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect.

In *Southern Railway Company v. Crockett* (234 U. S., 725), Pitney, Justice, delivering the opinion of the court, said:

We deem the true intent and meaning to be that the provisions and requirements re-

specting *train brakes*, automatic couplers, grab irons, and the height of drawbars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the safety devices and standards are capable of being installed upon the respective vehicles.

As was said by Mr. Justice Van Devanter in *Southern Railway Company v. United States* (222 U. S., 20)—

the act of March 2, 1903 (32 St., 943, ch. 976), amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should “apply to all trains, locomotives, tenders, cars and similar vehicles used *on any railroad engaged in interstate commerce*, and in the Territories and the District of Columbia and to all other locomotives, tenders, cars and other similar vehicles used in connection therewith.” [Our italics.]

Use of hand brakes to control speed of trains unlawful.

The only use of a brake is to control speed. When hand brakes are used their application is for the purpose of controlling speed. The act requires speed of trains to be *controlled* by the engineer. When speed of a train is controlled by a cooperation of engineer using air brake and brakeman using hand brake, by requirement of the carrier, the act is violated as much as if a combination of link-and-pin and automatic couplers were in required use.

The words "*without requiring brakemen to use the common hand brake*" to control the speed of the train were not made a part of the statute without meaning. These words indicate the congressional purpose by the act to prevent and make unlawful the use of the hand brake.

The word "*without*," in this section of the statute, signifies *an absolute exclusion*. The exclusion of the requirement of the use of the common hand brake to control the speed of a train is thus manifest from the literal wording of the act. By the obvious meaning of these literal terms the carrier is excluded from requiring brakemen to use the common hand brake for the purpose of controlling the speed of trains. The braking of trains was intended to be exclusively by the power brakes operated by the engineer.

When the engineer gives the whistle for *hand brakes*, the brakemen are "required" to use the hand brakes to control the speed of the train, and the law is violated.

In *United States v. Pere Marquette R. Co.* (211 Fed., 220, 223), cited with approval in *U. S. v. Erie R. Co.* (237 U. S., 402), Sessions, D. J., said:

Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed,

in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required, the only difference being that in the one the unit is a train or combination of cars and in the other a single car.

In the case of the *Virginian Railway Company v. The United States* (*supra*) it was said:

It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used.

On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification which in any way related to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make. The peculiar and unusual conditions which existed on this section of defendant's road can not be permitted to excuse an avoidance of the positive requirements of the act. Moreover, those conditions disclose no emergency or extraordinary difficulty. They simply show that the defendant, for the sake of convenience or economy, deliberately ordered the use of hand brakes in the daily and customary operation of its trains. The justification set up is that trains of 100 cars can not be moved on this stretch of track at the slow

speed of 10 miles an hour or less and kept under safe control with the use only of the prescribed power brake. But those operating conditions, which occasioned the need of hand brakes, are evidently of defendant's own creation. All it has to do to comply with the law is to make up trains of such smaller number of cars as can be safely and properly handled without resorting to the use of hand brakes. In short, the mandate of the Congress is disregarded in this instance, not because compliance involves any physical difficulty which is inherent or or practically serious, but merely because it involves some increase of expense. It is too plain for argument that no such reason can serve to condone disobedience to the command of the statute.

The statute in its literal terms makes mandatory the *use and operation* of the train-brake system on all trains on any railroad engaged in interstate commerce.

Section 2 of the amended act, March 2, 1903, specifically says, "and all power-brake cars in such trains which are associated together with the said 50 per centum (now 85 per centum) *shall have their brakes so used and operated,*" i. e., used and operated by the engineer of the locomotive drawing such train.

In the case of *New England Railroad Company v. Conroy* (175 U. S., 323), Mr. Justice Shiras in delivering the opinion of the court clearly indicated that under the provisions of this statute,

brakes that control the speed of the train should be applied by the engineer and not by brakemen or switchmen. He said:

* * * the engineer, as railroads are now operated, is a much more important functionary in the actual movement of the train, when in motion, than the conductor. *It is his hand that regulates the application of the brakes that control the speed of the train*, and in doing so he acts upon his own knowledge and observation and not upon the orders of the conductor. Particularly has this become the case since the introduction of the air train brake system. We can take notice of the act of March 2, 1893 (27 Stat. at L., 531), which enacted:

“* * * it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.”

We do not refer to this statute as directly applicable to the case in hand, *but as a legislative recognition of the dominant position of the engineer.* [Our italics.]

Attention is again directed to the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of *The Virginian Railway Company v. The United States*, from which the following is quoted:

In our judgment the legislation here considered manifests the plain intention of Congress to require the control of trains in ordinary line movement by the train brakes prescribed and to make unlawful the use of hand brakes for that purpose. True, the use of hand brakes is not in express terms prohibited, but this is the necessary implication of the language used, and it admits of no other reasonable construction. It was the evident purpose of the train-brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep employees from going between cars, so the object of the train brake is to keep employees from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation, as the courts have repeatedly said. For example, in *Erie R. R. Co. v. U. S.*, 197 Fed., 287, where it was held that the train-brake requirement does not apply to switching movements in railroad yards, the court took occasion to say of the act:

“Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving

brakemen, as far as possible, from the dangers incurred in manipulating hand brakes."

The whole argument of plaintiff in error rests upon the proposition that, since the statute requires that all cars be equipped with hand brakes and does not expressly forbid their use for controlling the speed of trains, there is left to "the judgment or discretion of the men operating the trains the decision as to when and under what circumstances the power brake should be used, and as to when and under what circumstances the hand brake should be used." The proposition is also stated in this form:

"The object of Congress was evidently that the automatic power brakes should be used to control the speed of the train at all times when good railroad practice would require the use of such brakes, and to permit the use of hand brakes under such circumstances as, in the judgment of the people in charge of the operation of the trains, would promote the safety of the operation."

It is obvious that such a construction would practically nullify the train-brake requirement and take all effective meaning from the provision which makes it unlawful to run "any train" unless the locomotive and cars are so equipped that the engineer can control its speed "without requiring the brakemen to use the common hand brake for that purpose." The contention must be rejected as clearly unsound. It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified

in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used.

On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification which in any way related to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make.

The decision of the court below states:

If prohibited at all the use of hand brakes is only prohibited by implication; but crimes are not defined or created in that way.

But we are not dealing with a criminal offense or a criminal statute. And the implication which the Government urges is one that arises naturally from the express words of the act.

In the course of the opinion of the court below the following also appears:

As already stated, Congress has sought to obviate the necessity for going upon trains to use hand brakes to control their speed by requiring the use of certain equipment and has imposed penalties for failure to furnish that equipment.

If "Congress," as Judge Rudkin says, "sought to obviate the *necessity* for going upon trains to use the hand brakes," then the act indicates that its *purpose* was to prevent such use of the hand brakes.

A carrier may not require the brakemen to assume the peril which it was the purpose of the act to prevent.

Congress did not legislate against the *necessity* to use the hand brakes and leave lawful and compulsory the assumption of the peril which the act by its express words was intended to obviate.

This is not a case where the purpose of the legislature is not apparent from the language used. The words employed indicate the legislative purpose that brakemen should not be required to operate the hand brakes. There is no failure of the words of the act to make clear the legislative purpose. It is not at all like the case of *Rex v. Shone* (6 East, 518), in which Lord Ellenborough said: "*We can only say of the legislature quod voluit non dixit.*" In this case Congress said it. It clearly expressed its condemnation of the use of the dangerous hand brakes. This stands forth clearly in the strong terms of the section of the act now under consideration.

The section is not to be construed as if it *ended* with the provision as to the control of the train by the engineer. Congress, in the use of the words which followed, was not merely recording its purpose, was not expressing an explanation or apology for what went before, but was still legislating against the particular danger at which the section was wholly aimed.

It is not a fair construction of this section to say that it legislates against the means by which danger exists and that its mention of the danger itself was without purpose or intention to legislate upon that subject. Is it to be fairly assumed from the language used that Congress, in its anxiety to keep the men off the cars in the use of the hand brake, made unlawful the nonuse of power brakes, and that the requirement of the use of the hand brake was still to be lawful? If the requirement of the use of the hand brake was still to be lawful, why make unlawful the nonuse of the power brake? The nonequipment with the power brake was made unlawful because such nonequipment was a temptation to the use of the hand brake. Can it reasonably be held, when the whole section is taken together and considered as a whole, that the legislation was directed solely against the *necessity* for the use of the hand brakes and that the *actuality* of their use was to remain legal and permissible?

If lack of statutory *equipment* is made unlawful because it *tends* to require brakemen to operate the hand brakes, by so much more it is evident that Congress intended to make unlawful the requirement itself that brakemen should operate the hand brakes. The "essence of the thing required to be done" was not particular equipment, but keeping brakemen from the tops of cars in the use of the hand brakes.

Two special forms of accidents to railroad employees were particularly in the legislative mind.

These were accidents from "falling from cars" and from "coupling cars." This stands out clearly in the language of the act, in the testimony before the legislative committees in the hearings before the bill was reported, and in the reports of the committees before the bill became a law.

The following table compiled from the Accident Bulletins of the Interstate Commerce Commission, shows the number of employees killed and injured, caused by falling from the roofs of box cars while setting hand brakes:

Year.	Employees.	
	Killed.	Injured.
1902.....	27	232
1903.....	25	370
1904.....	44	412
1905.....	27	364
1906.....	32	454
1907.....	37	472
1908.....	23	434
1909.....	25	430
1910.....	22	543
1911.....	37	512
1912.....	25	639
1913.....	28	765
Total (12 years).....	352	5,627

It was to *prevent* such deaths and injuries that the act was passed. It was recognized by Congress that the provisions of the common law failed to prevent these particular accidents, and therefore its somewhat stringent provisions were enacted into law to prevent accidents and to save lives.

The terms of the act itself show that it has a "broader scope" than "merely the regulation of the character of appliances to be used." This is the construction of the act which is deducible from the *Johnson case* (196 U. S., 1); the *Taylor case* (210 U. S., 281, 294); the *Schlemmer case* (205 U. S., 1), and from the general current of judicial authority in this country.

Let us proceed with a study of the act itself. It is provided that power brakes shall be "*sufficient*," so that men may not be required to go on the tops of the cars to operate hand brakes. It is provided that couplers shall couple automatically, so that it may not be necessary for men to go between cars. These provisions must be given similar construction. Can anything be clearer than the particular intention of Congress to prevent by these provisions and requirement of men to go on top of cars to operate hand brakes and to go between cars to couple them? These were the specific dangers legislated against. These were the particular dangers the legislation was intended to prevent. These provisions are to be given like construction. No good reason can be asserted for the application of a different rule in the construction of the power-brake provisions than that which has been applied to the coupler provision. The obligation imposed by section 1 of the original act, that the power brakes shall be sufficient so that brakemen need not be required to go on the tops of cars to operate the hand

brakes, is not in the least degree modified, affected, or impaired by the provision of section 2 of the amended act fixing a minimum of the cars in a train the power brakes of which shall be operative.

Section 3 of the amended act provides:

Nothing in this act shall be held or construed to relieve any common carrier * * * from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act, apply to this act.

By virtue of this section no construction is permissible which suggests repeal of any of the provisions of the first section by implication. Congress clearly expresses its intention not to repeal any of the "liabilities or requirements" of the former act.

Furthermore, there is no logical conflict between a provision that power brakes shall be sufficient to enable the engineer to control the speed of the train and a provision fixing a minimum of power brakes in a train. It is to be noted that the percentage of power-braked cars in any train required by the act is required as a *minimum* and not as a standard. Congress had some reason to declare the percentage required by the act to be a minimum and not a

standard. If a lower percentage of power-braked cars in a train were sufficient, it would still be a violation of law, because not up to the minimum. But if the minimum was not *sufficient* to enable the engineer to control the speed of the train without requiring men to go upon the cars to operate the hand brakes, the statute is violated. No other construction is admissible if the proper meaning is attributed to the word "minimum" used by Congress. No other meaning or construction is admissible to carry out the manifest intent of Congress.

Both provisions indicate the congressional intent to require the taking of trainmen off the tops of the cars to operate hand brakes. To hold that at an attempt to make more specific a requirement of power-brake operation, and more surely to provide against the necessity of men operating hand brakes on the tops of cars, could operate as a repeal of the provision against such operation of the hand brakes, would be an interpretation hostile to the legislative intent. No purpose can be asserted for the fixing of a minimum of power-braked cars, except the purpose declared in section 1 of the earlier act, to make unnecessary the requirement of the operation of the hand brakes. The congressional intent is the guide for judicial interpretation.

To make an interpretation that acts are lawful which Congress has twice indicated its purpose to restrain would be unjustifiable in the extreme. The language of both acts could have been clearer, but in both the legislative intent is manifest. In

the general current of judicial authority on this act, so far as it has been interpreted by the courts, the intent of Congress has been relied upon, and a line of judicial decisions on the subject of the coupler provisions has had the effect of cutting down the large number of deaths and injuries resulting from coupler accidents. The figures on this subject are startling and must give great satisfaction to every court which has contributed to this beneficent result.

The train-brake provision, if judicially supported in the same manner, will cut down the number of fatalities resulting from trainmen falling from the tops of cars, which number is large and alarming, and will be a source of gratification to every court which may aid in bringing about this laudable result.

This can be done by approaching the subject on broad lines, carrying out the manifest intent of the Congress, and by disregarding, in the construction of a humane remedial statute, those merely technical rules of statutory construction which had their basis originally in a judicial effort to save life when death was the sentence under most penal statutes.

The humanity of judges established the strict and technical rules of statutory construction. Humanity and the desire to save human life may justify broader rules of construction of an act intended to save the lives of brave men in a particularly hazardous and useful calling.

In *Johnson v. Southern Pacific Co.* (196 U. S., 1), Chief Justice Fuller held that the test of compliance with the act was whether or not it was necessary for a man to go between the ends of the cars to effect couplings and uncouplings between them. He said:

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning" (p. 19).

* * *

In the present case the couplings would not work together. Johnson was obliged to go between the cars, and the law was not complied with (p. 20).

To apply the construction of section 2 as made by Chief Justice Fuller in the *Johnson case*, and its application is unquestionable, it would be paraphrased thus:

The test of compliance with the act is whether or not brakemen were required to use the common hand brake to control the speed of the train. The risk in going on the top of cars to use the hand brakes was the evil sought to be obviated by the use of the train brakes operated by the engineer. True,

no particular design of power brakes was required, but whatever the devices used, they were to be effectively sufficient for the engineer to control the speed of the train without requiring brakemen to use the common hand brake for that purpose. Congress was not paltering in a double sense, and its intention is found "in the language actually used," interpreted according to its fair and obvious meaning. In the present case the railroad was satisfied that there was a lack of sufficiency in the power brakes for the ordinary freight traffic. As the same was made up in heavy trains on the descending grade and required the speed of the train to be partially controlled by hand brakes to supplement the power brakes, the brakemen were required to use the hand brakes to control the speed of the train, and the law was not complied with.

If the power brakes were "sufficient" to control the speed of the train, the requirement that brakemen also use the common hand brake for that purpose was placing these men in the very danger that Congress legislated against, and is a violation of the act. To hold otherwise would be to hold that Congress did not legislate against the danger, but only as to equipment.

If equipment be the sole requirement, the provision as to the control of the speed of the train by the engineer is surplusage. The legislation is specific that the control of the speed of the train shall be in the hands of one man—the engineer. This

expressly negatives any legislative intention to permit the speed of the train to be controlled otherwise.

Control of the speed of the train by the engineer is clearly defeated if train brakes are set and released under orders from the conductor.

If the power brakes were not "sufficient to control trains" on such grades as those from Cascade Tunnel to Merritt, and the brakemen were required to aid in the control of the train with the common hand brakes, then the law was clearly violated.

That the railroad acted upon the belief that power brakes were not sufficient is a fact from which some evidence may be inferred that the power brakes were not sufficient. If power brakes were not sufficient, the statute was clearly violated.

If the power brakes were sufficient, the men were unnecessarily imperiled in violation of the clear intent and purpose of Congress in passing the act.

The first section of the act was framed for the purpose of obviating the necessity of brakemen going on the top of the cars to operate hand brakes. This was the specific danger legislated against. This purpose stands forth clearly from the language of the act. The implication is irresistible that Congress intended to make illegal the requirement that brakemen should go on the top of cars to operate hand brakes. Any construction that such use of the hand brakes is not illegal defeats the evident and manifest purpose of Congress. It also deprives those injured by falling from cars

when required to operate hand brakes of the advantages of the remedial provision of the act, especially of that provision abolishing the assumption of risk.

Furthermore, such a construction permits the continuance of the peril which the act sought to abolish. It places human life in jeopardy and defeats the humane purpose of Congress. It leaves the first section of the act, to comply with which the railroads expended millions, without any reason or purpose for its enactment.

The purpose of the law was to enable the speed of the train to be controlled solely and exclusively by the engineer through the use of train or power brakes, and to avoid the necessity of trainmen going upon the tops of the cars to operate the hand brakes. It is the duty of the railroad to comply with the provisions of this law. This duty is mandatory and absolute.

If it be true that on certain grades long trains of heavily loaded cars can not, with safety, be handled with the air-brake equipment available at that time and place, it becomes the duty of the railroad so to regulate the length of train and the load carried that the air or power-brake equipment at such time and place shall be sufficient for the control of such train without the use of the hand brakes for that purpose, or so to regulate or increase the efficiency or power of its air-brake equipment that the heavier loaded train may be safely handled without the use of the hand brakes to control its speed.

If the power-brake equipment, at a particular time and place, is overloaded so that the same may not be safely relied upon to control the speed of the train, the statute has been violated, and the use of the hand brakes to control the speed of the train is not justified.

IT IS THE MANDATORY DUTY OF THE RAILROAD TO MAINTAIN A PROPORTION BETWEEN ITS POWER-BRAKE EQUIPMENT AND THE LOAD IN THE TRAIN TO BE CARRIED OVER ANY PARTICULAR GRADE ON ITS RAILROAD, SO THAT AT ALL TIMES THE ENGINEER SHALL BE ABLE TO CONTROL THE SPEED OF THE TRAIN BY THE POWER BRAKES, AND IN ORDER THAT IT MAY NOT BE NECESSARY FOR THE TRAINMEN TO GO UP ON THE CARS AND OPERATE THE HAND BRAKES TO CONTROL THE SPEED OF THE TRAIN.

In the case of *United States v. Standard Oil Company of New Jersey and others*, 173 Fed., 177, Circuit Judge Hook, in his concurring opinion, said:

The construction of the act should not be so narrow or technical as to belittle the work of Congress, but on the contrary it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. * * * The wisdom of a law lies in its spirit, as well as in its letter, and unless they go together in its construction and application justice goes astray. [p. 194.]

It is an ancient rule of statutory construction that "a law directing a thing to be done in a certain manner implies that it shall not be done in any other manner." (Potter's Dwarrris on Statutes and

Constitutions, page 228, note 30, citing *U. S. v. Han Penals*, 1 Paine, 406; Dane's Abr., vol. 6, 591 to 593.)

It is clear that this act requires that the speed of trains be controlled by power brakes. Under the rule of construction just above quoted, the act forbids such control by hand brakes. Not only is the use of the hand brakes forbidden by the act by implication, from the compulsion of power brakes under the rule of construction just above quoted, but it is made expressly by the terms used at the conclusion of the first section.

The first and second sections of the act are to be given the same construction.

The several sections of the act of Congress of 1893 (196, 27 Stat., 531), making it unlawful for railroad companies engaged in interstate commerce to use cars not equipped with certain specified appliances, are framed upon the same general plan, and notwithstanding any minor differences in their language, a declaration by the Supreme Court of the United States that one of them is intended to impose upon the carrier the absolute duty of keeping in good repair the equipment therein required, irrespective of any question of negligence, determines that a like interpretation is to be given to the others. (Justice Mason's opinion, rendered for the Supreme Court of the State of Kansas in the case of *Brinkmeier v. The Missouri Pacific Ry. Co.*, 105 Pac., 221.)

The second section, the construction and interpretation of which is familiar, legislates against the necessity of men going between the cars. The first section legislates against the requirement of brakemen to use the common hand brakes to control the speed of trains.

To facilitate comparison, the two provisions are set forth in parallel columns:

SECTION 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SECTION 2.

That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

Now, bearing in mind the similarity of these sections in grammatical construction, let us examine the question in the light of judicial construction of the second section.

* * * The object of the act, as expressed in the title, is "to promote the safety of employees and travelers; and in so far as it applies to employees engaged as brakemen on trains, it was intended to protect them from the danger of entering between cars in order to couple them up." (*U. S. v. Gt. Northern Ry. Co.*, 150 Fed., 229, 230.)

So it may reasonably be concluded that the first section of the act "was intended to protect them from the danger" of being required to use the common hand brake to control the speed of the train.

The highest duty of Government is to conserve the lives of the people.

Legislation conducing to this end should be liberally interpreted by the courts.

In the construction and interpretation of such laws technical and rigid adherence to the strict grammatical construction may be disregarded when necessary to carry out the manifest life-saving purpose of the legislation, if that purpose is clearly evident from the words used.

Act of April 14, 1910, requiring efficient hand brakes applies to individual cars.

It may be contended that the requirement by the statute of an efficient hand brake legalizes the use of the hand brake to control the speed of trains. But

it is important to note that the act which contains the hand-brake provision is specifically applicable to cars.

The exact language of the hand-brake section of the act is as follows:

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

That this section applies to individual cars, as was intended by Congress, is fully borne out by the report of Senator Elkins, from the Committee on Interstate Commerce, submitted February 18, 1910, Senate Report No. 250, Sixty-first Congress, second session:

Another serious menace to employees has developed during recent years from the poor condition of hand brakes.

It is now customary at a great many large terminals to switch cars by gravity in what are known as "hump" yards. In *these* situations men are required to control the speed of the *cars* by means of *hand brakes*. Because of the rapid development of air-brake equipment, the hand brake has been neglected, and when men are called upon to use it in these *exceptional situations* they find it inefficient or inoperative. As a result, employees are subjected to unnecessary risk, and many of them are killed and injured from this cause. The inefficiency of the hand brake also produces collisions between *cars* in these hump yards, and results in serious damage both to equipment and lading:

The lawfulness of the use of the hand brake to control the speed of a car or cars when segregated from a train in no manner controverts the contention that the use of hand brakes to control the speed of trains is unlawful.

And so the law may and does require the maintenance of efficient hand brakes, but this is solely and entirely for use in handling individual cars and in no manner affects the requirement that the speed of trains must be controlled by the use of power brakes by the engineer.

That the contention of the Government is sound regarding section 2 of the act of April 14, 1910, is sustained by the case of *United States v. Erie R. Co.*

(237 U. S., 402), wherein Mr. Justice Van Devanter said:

It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars.

The statute made mandatory the use and operation of power brakes by the engineer of the locomotive drawing such train when it provided in section 2 of the act of 1903, that "all power-braked cars in such train * * * shall have their brakes so *used and operated.*"

That use and operation of the power brakes are requisite and the mere equipment with power brakes

is not sufficient, is a necessary inference to be drawn from the following decisions which were based upon trains which were equipped with power brakes but not used and operated:

Belt Railway Company of Chicago v. United States, 168 Fed., 542; *Atchison, T. & S. F. Ry. Co. v. United States*, 198 Fed., 637; *United States v. Grand Trunk Ry. Co.*, 203 Fed., 775; *United States v. Pere Marquette R. Co.*, 211 Fed., 220; *La Mere v. Ry. Transfer Co. of Minneapolis*, 145 N. W., 1068.

When used only partly to control the speed of the train and supplemented by or assisted by or in conjoint use with hand brakes, then the speed of the train is not controlled by the air brakes.

When air brakes control, their operation governs the speed.

When both kinds of brakes are used, it can not be said that the engineer controls the speed of the train with the power or train brakes.

The speed of passenger trains is controlled solely by the train brakes. The law is the same as to both classes of trains. Freight trains when their power brakes are maintained in efficient condition for use may be even more safely operated by the train brake alone than by any partial use of both.

CONCLUSION.

The contention of the Government is sustained—

1. By the legislative history of the act.
2. By the express words of the act.

3. By the purpose of the act to prevent injury and death of brakemen called upon to use the hand brake.

4. By the well-considered precedent in *Virginian Ry. Co. v. United States* (4 C. C. A.).

Respectfully submitted.

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